



# Annual Report 2022

Citizenship and Immigration Services  
Ombudsman

June 30, 2022



Homeland  
Security

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Homeland  
Security



# Homeland Security

June 30, 2022

The Honorable Richard Durbin  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Jerrold Nadler  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

The Honorable Charles Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Jim Jordan  
Ranking Member  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

Dear Chairmen and Ranking Members:

The Office of the Citizenship and Immigration Services Ombudsman is pleased to submit, pursuant to section 452(c) of the Homeland Security Act of 2002, its 2022 Annual Report.

I am available to provide additional information upon request.

Sincerely,

A handwritten signature in black ink, appearing to read "Phyllis Coven". The signature is fluid and cursive, with a long horizontal stroke at the end.

Phyllis Coven  
Citizenship and Immigration Services Ombudsman

# MESSAGE FROM THE CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN



I am once again honored to submit an Annual Report to Congress about the state of our immigration benefits system, this time examining calendar year 2021. This Report, presented each year on June 30, details the urgent systemic issues affecting U.S. Citizenship and Immigration Services (USCIS) and identifies potential solutions to resolve these problems.

In last year's Annual Report, we explained that USCIS faced a year like no other due to the harmful effects of the COVID-19 pandemic. The pandemic turned what were already significant processing delays into unprecedented backlogs across the entire system. This year's Report examines the "snowball effects" and pain points associated with these backlogs and recommends actions USCIS can take to address not only the human consequences suffered by applicants, families, and employers but also the detrimental impacts on the agency.

While USCIS has taken numerous steps to address these issues, and we are heartened by its stated commitment to reduce these barriers, more must be done. Simply put, applicants are not only losing valuable time in their immigration journey, they are losing jobs, livelihoods, and the ability to travel. As the Report details, the path for seeking expedited or emergency benefits is less than clear, leading to additional inquiries and requests. These snowball effects also compound the agency's work, further diverting USCIS' finite resources to customer service, congressional inquiries, case assistance requests, and duplicative filings.

This Annual Report identifies operational and administrative ways to mitigate these issues, but USCIS' overriding need is monetary flexibility and independence. The agency needs the ability to hire and train additional staff to meet processing surges; plan for and attend to its many humanitarian obligations without passing those costs on to other applicants; provide true customer service; and complete its ambitious digital strategy to further streamline the adjudicative process. In our recent recommendation on USCIS' fee-for-service funding model, located on our website\* and a summary of which is included in this Report, we examine this funding issue extensively and conclude that the agency should realign its approach to allow for greater flexibility. Appropriated monies were undoubtedly welcome this past year to initiate that process, but a steady stream of funding to give USCIS flexibility would alleviate burdens on all filers.

Issuing our Annual Report each June is a significant accomplishment for our small but dedicated team; however, it represents only a fraction of the diverse work we do, much of which is behind the scenes. We provide assistance to thousands of individuals struggling to understand USCIS' complexities. We effect meaningful change by listening to stakeholders and identifying and recommending solutions on a wide array of systemic issues. Achieving these goals starts with an integrated approach to our work. Our staff is made up of professionals who bring extensive experience in the immigration field from both inside and outside government and who are deeply committed to the office's mission. Our workforce here in the CIS Ombudsman's office is uniquely well-rounded and represents the best of what it means to be a public servant.

This past year our office made great strides by bringing in personnel to fill key vacancies and introducing a new Strategy team to lead strategic planning, business process reengineering, system development, and data analysis initiatives. We aim to better use data to inform our work, simplify the process for submitting evidence of trends and problems, and incorporate methods to better track and propose solutions to USCIS. We also issued our first strategic plan and are hopeful that in 2023, we will be

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\* [www.dhs.gov/publication/cis-ombudsmans-recommendations-uscis-2022](https://www.dhs.gov/publication/cis-ombudsmans-recommendations-uscis-2022).

able to introduce local ombudsmen in important locations across the country. This effort will begin to fully realize the structure that Congress envisioned 20 years ago when it established our office.

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## CASE ASSISTANCE

Last year, we described how the pandemic heightened the need for our office's role as an avenue of last resort. Unfortunately, the processing delays at USCIS in 2021 created another historic upswing in our case work, resulting in 26,097 case assistance requests—a 79 percent increase over 2020, which previously represented our largest number of requests.

Despite this surge, we still strive to act on requests for case assistance in a timely manner. To do this, we take steps to ensure that our assistance provides the value that requestors expect and deserve. For example, USCIS' extensive processing delays meant it could not readily address individual inquiries where the only issue was that their case was outside of normal processing times. We were forced to deprioritize these case assistance requests and focus on those where the agency could give us meaningful results. We continue to raise delayed processing times to USCIS as a systemic issue and are optimistic that the agency will reduce processing times across benefit requests, as it has pledged to do. We hope to be able to reprioritize these types of case assistance requests when that happens.

Reordering our priorities helped us focus on requests where we believe USCIS can quickly take action to resolve the issue. These priorities include cases involving non-receipt of certain documents or notices; upcoming removal proceeding hearings; improper rejections; delays with notifying another agency when USCIS approves an immigration benefit request; and those impacting U.S. military personnel and their families.

Some of our successes this year include:

- Requesting that USCIS review the previously provided supporting documentation that clearly established the urgency and merit of the request when a terminally ill applicant's request to expedite a travel document was denied. USCIS issued the travel document a month later, and the applicant was able to visit his family overseas;
- Helping two siblings obtain approval of a family-based petition under humanitarian reinstatement after their parent passed away. They had been waiting more than 2 decades for a visa number to become available and were finally eligible to pursue a green card;

- Assisting an applicant who could not attend a naturalization ceremony due to their living facility's social distancing policy at the height of the pandemic. After we advocated for the applicant, USCIS reopened the case and the applicant became a U.S. citizen a month later; and
- Facilitating the adjudication of a pending green card application for a victim of Hurricane Ida so they could apply for disaster relief.

These are just a few examples of the many stories demonstrating how we help people to work, travel, obtain medical care, renew driver's licenses, and be reunited with their families. However, we continue to believe that backlogs and processing delays are perhaps the greatest issues facing USCIS and its stakeholders. Until USCIS resolves those issues, we expect our caseload to remain at an extraordinarily high level.

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## PUBLIC ENGAGEMENT

Our Public Engagement Division, established 2 years ago, provides our office with a strong presence across the country. In 2021, we connected with over 7,500 stakeholders through 143 engagements where we gathered feedback about their experiences with USCIS. These stakeholders included community and faith-based organizations; universities; national associations; local, state, and federal government partners; small businesses; and Fortune 500 companies. Our engagements give us a broad variety of perspectives on all types of immigration benefit issues. Working with USCIS, multiple federal agencies, and other DHS components, our national webinar series covered a range of topics, including:

- Combating human trafficking and forced labor in imported goods;
- The H-1B electronic registration process for attorneys and representatives;
- USCIS' online filing and customer service tools;
- The USCIS Contact Center;
- Online filing for Form I-765, *Application for Employment Authorization*, for F-1 students seeking Optional Practical Training;
- Naturalization and immigrant integration;
- Services for noncitizen veterans;
- E-filing Form I-821; and
- The Office of the Immigration Detention Ombudsman.

Our engagements help us identify problematic trends in case processing, shape how we engage with USCIS, and inform our recommendations and policy priorities. We send stakeholder messages to approximately 152,000 distribution list subscribers and followers on social media. These messages amplify and clarify USCIS policy. They include best practices for contacting USCIS, information about processing of employment-based immigrant visas, correcting errors on EADs for Afghan nationals, and what forms are available for online filing.

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## POLICY

Our Policy Division reviews and synthesizes information from our case assistance and public engagement efforts, consults with USCIS on these issues, and recommends operationally realistic solutions. We are very proud of the work we do all year behind the scenes to address policy-related issues. We have achieved the goal set in 2021 of issuing recommendations throughout the year and increasing the cadence by which we share trends and advice with the agency.

We issued two formal recommendations in advance of this Report. Our beneficiary notification recommendation for Form I-129, *Petition for a Nonimmigrant Worker*, urges USCIS to provide certain beneficiaries with documentation that the law requires them to have and which would help prevent unscrupulous employers from exploiting them. In our recommendation on USCIS' fee-for-service funding model, referenced above, we underscore the necessity of providing USCIS with monetary flexibility to reduce delays in processing times, prevent backlogs in the future, and fund humanitarian programs without distributing these costs to other filers. We look forward to seeing action in response to these recommendations.

We are proud that USCIS has acted on recommendations from our 2021 Report. They extended the receipt notice for Form I-751, *Petition to Remove Conditions on Residence*, to provide longer evidence of conditional permanent resident (CPR) status; waived interviews for certain CPRs; implemented a risk-based approach to maximize best practices adopted during the pandemic, such as video-facilitated interviews; developed a strategic backlog reduction plan; and advanced its digitization strategy, among others.

Outside of public view, we provide numerous informal recommendations to USCIS aimed at removing barriers to the immigration system as soon as they emerge. Our goal is to identify and recommend ways to address pressing problems. We do this by submitting memoranda to USCIS

leadership and meeting with the agency's policy and operational offices and directorates.

While not all our suggestions are acted upon, we believe our recommendations have helped lead to important changes at USCIS, such as:

- Extending the automatic extension period for certain EAD classifications;
- Clarifying that E and L nonimmigrant spouses are authorized for employment incident to their status and issuing I-9 compliant I-94s; and
- Establishing processing goals for EADs and other categories.

Our recommendations are not solely about mitigating processing delays. With the help of stakeholder engagement and our casework efforts, we identify systemic issues across benefit types and have recommended the following recent improvements made by USCIS:

- Eliminating the "bridging requirement" for B-2 visitors seeking to change their nonimmigrant status to F-1 students;
- Implementing a process where employment-based green card applicants can transfer the basis of their application to a new Form I-140, *Immigrant Petition for Alien Workers*, so that they can access an available immigrant visa when priority dates advance in the Department of State's Visa Bulletin;
- Changing procedures so that an upgraded or downgraded Form I-140 can be premium processed without the original labor certification;
- Revising request for evidence templates for O-1 nonimmigrant petitions to ensure requests align with regulatory requirements; and
- Removing the requirement where generally all employment-based adjustment of status cases require an interview.

We recently provided informal recommendations on issues such as Operation Allies Welcome and Uniting for Ukraine; improving messaging related to case handling during the employment-based adjustment of status process and addressing frontlogs; the use of credit card payments; U.S. mail issues; and better access to customer service channels.

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## MOVING FORWARD

USCIS faces challenges ahead as it works to reduce backlogs and processing times. These goals require its full attention. Its strength lies in its people—government servants devoted to the mission of the agency to “uphold America’s promise as a nation of welcome and possibility with fairness, integrity, and respect for all we serve.” They cannot achieve these goals without help from Congress in the form of resources; from stakeholders who provide insightful feedback; and from its partners, such as our office, who constructively collaborate to ensure the agency completes its mission fairly and on time.

We applaud the agency’s commitment to removing barriers to accessing immigration benefits and look forward to our continued partnership in this effort. We especially value our collaboration with dedicated USCIS employees at all levels, especially in improving customer service (a collaboration that was just recognized with a Secretary’s Award for Innovation, a first for this office). The CIS Ombudsman’s office is equally committed to continuing and improving the timeliness of our case assistance, expanding our engagement and outreach, and enhancing our responsiveness on policy issues. I am grateful to my staff for their expertise and devotion to providing our vital and uniquely helpful service to the public and the agency.

Sincerely,



Phyllis A. Coven  
CIS Ombudsman  
Office of the Citizenship and Immigration  
Services Ombudsman  
Department of Homeland Security  
cisombudsman@hq.dhs.gov

# EXECUTIVE SUMMARY

The Office of the Citizenship and Immigration Services Ombudsman (CIS Ombudsman) 2022 Annual Report covers calendar year 2021, as well as key developments in early 2022. It contains:

- An overview of the CIS Ombudsman’s mission and services;
- A review of U.S. Citizenship and Immigration Services (USCIS) programmatic and policy challenges during this reporting period; and
- A detailed discussion of pervasive problems, recommendations, and best practices in the administration of our immigration laws.

## MITIGATING THE IMPACTS OF BACKLOGS: ANALYSES AND RECOMMENDATIONS

### The Avalanche Impact of Backlogs: 2021 in Review

USCIS has always had its share of backlog issues, but none so severe in recent memory as the ones it currently confronts. These lengthy processing times and the high number of unadjudicated cases—created out of the pandemic’s unprecedented effect on its ability to operate, insufficient revenue, and employee attrition—have had a massive “snowball” effect on the agency’s operations. While the agency has taken many actions to lessen the backlog’s impact, these snowball effects multiply, doing real harm to stakeholders and adversely impacting applicants and petitioners every day. To fully address the backlogs, USCIS must also continue to address their consequences. USCIS’ commitment to mitigating its backlogs of cases, as evidenced by setting aggressive processing goals for next year, must be matched with a full commitment to eradicating the worst of these pain points for applicants and petitioners so that they may continue to work, travel, obtain evidence of status, and be able to access expedited processing, when eligible, in a meaningful and consistent way. While the agency has made a good start, the specific studies throughout this Annual Report identify additional actions that can be taken.

### The Need for More Flexibility in Renewing Employment Authorization

U.S. employers depend on recruiting and retaining a stable workforce to meet their goals, and employees depend on uninterrupted work authorization to maintain steady income to support themselves and their families. Delays in renewing employment authorization documents (EADs) interrupt employment for noncitizens who had previously been found eligible while simultaneously interrupting the ability of U.S. businesses to employ their workforce continuously. USCIS has taken steps to help prevent these employment gaps, including providing for longer automatic EAD extension periods when a renewal request is filed on time, extending validity periods for certain EADs, and expediting EAD renewals in specific occupations.

As the agency commits to addressing this issue, the CIS Ombudsman recommends that USCIS:

- Build on existing automatic extension periods to allow for uninterrupted work authorization while waiting for USCIS to adjudicate a renewal EAD application;
- Provide better options for nonimmigrant spouses to renew their employment authorization;
- Allow applicants to file for renewal EADs earlier and issue renewal EADs with validity periods that begin when the original EAD expires;
- Continue to expedite EAD renewals for workers in certain occupations in the national interest;
- Further explore and augment the use of technology, including online filing and machine learning, to automate EAD processing;
- Implement new regulations that provide more flexibility for USCIS and approved workers during periods of backlogs or long processing delays;
- Increase flexibility in the Form I-9, *Employment Eligibility Verification*, process; and
- Eliminate the need for a separate EAD application when filing for certain benefits.



## Increasing Accessibility to Legitimate Travel: Advance Parole

Under current regulations, certain adjustment of status (AOS) applicants who depart the United States before their Form I-485, *Application to Register Permanent Residence or Adjust Status*, is adjudicated are considered to have abandoned that application, which results in a denial. To avoid this denial and preserve their eligibility to adjust status, AOS applicants can file Form I-131, *Application for Travel Document*, to obtain an advance parole document (APD) from USCIS before leaving the United States. Due to processing delays, applicants are finding it more difficult to receive APDs in a timely manner, which has led to more requests to expedite these applications and to issue advance parole for emergencies, thus adding to the workloads of both the USCIS Contact Center and the adjudicating offices. USCIS should consider the following recommendations to reduce barriers to travel and enable USCIS to better manage the process of providing APDs to those who need them most:

- Authorize advance parole incident to the filing of Form I-485 and upon providing biometrics to USCIS, thereby eliminating the need to file Form I-131 and allowing for travel with a receipt for a pending Form I-485;
- Change the AOS abandonment provisions such that they only apply to applicants who are not under exclusion, deportation, or removal proceedings and who leave without a receipt notice evidencing advance parole;
- Move high-volume Forms I-131 into a digital environment, allowing USCIS to leverage its technological capabilities to electronically notify the applicant and U.S. Customs and Border Protection (CBP) when it grants advance parole;
- Extend the validity of APDs for individuals with pending Forms I-485 until USCIS renders a decision on the Form I-485 or to coincide with current processing times;
- Stop considering a pending Form I-131 for advance parole to be abandoned by travel abroad; and
- Improve the emergency advance parole process by creating a specific track at the Contact Center for obtaining needed in-person appointments; foster well-trained points of contact at the field offices for processing requests; develop a unified system of accountability for tracking the number of requests and outcomes of decisions rendered; and ensure consistent adjudications among field offices.

## Improving Access to the Expedite Process

There are times when an applicant or petitioner may need a decision from USCIS sooner than the average processing time. In these instances, individuals or their legal representatives can submit an expedite request to USCIS if they meet certain eligibility criteria. Although USCIS is committed to delivering timely decisions, operations affected by the pandemic and insufficient resources have resulted in longer processing times. The expedite request caseload has consequently increased, further diverting resources within the agency and making it challenging for USCIS to process these requests efficiently. There is incomplete data on the number of expedite requests USCIS receives and their rate of approval and denial. Additionally, there are inconsistencies in how USCIS offices apply the criteria used to grant an expedite request. As a result, requestors find the process confusing and unreliable. To make the expedite process more efficient, USCIS should:

- Establish a centralized process for expedite requests;
- Create a new form for submitting expedite requests;
- Develop standardized guidance about the requirements and process; and
- Engage in robust data collection to maintain accountability.

## Initiating a Discussion on Ways to Address the Affirmative Asylum Backlog

The asylum backlog has grown to more than 430,000 pending cases, with devastating impacts on asylum seekers and their family members. USCIS' existing asylum system cannot meaningfully reduce its backlog, let alone keep pace with incoming applications. The agency must consider new operational approaches to improve the quality and efficiency of asylum adjudications without compromising integrity or equity. The recommendations below are intended to spark a crucial discussion on innovative ways to address the backlog. The CIS Ombudsman looks forward to refining these proposals through continued engagement with stakeholders and USCIS.

- Apply best practices from refugee processing to asylum backlog reduction efforts;
- Identify and group cases to increase efficiencies in interviews and adjudications, to prioritize asylum applicants in need of immediate protection, and to deprioritize non-priority applicants, such as those who have other forms of relief available;

- Expand the role of the Asylum Vetting Center to triage cases into different case processing tracks that allow USCIS to use truncated or accelerated processing for certain groups of cases;
- Rethink case preparation processes to include case complexity analysis, focused interview guidance for specific caseloads, and interview orientation for applicants;
- Consider specialization, interview waivers, and simplifying final decisions as a way to increase case completions while supporting the welfare of officers and applicants; and
- Implement a feedback loop between USCIS and the immigration court and target protection screening efforts to improve the accuracy of decisions and ensure the effective use of government resources.
- Provide guidance to officers on how to contact EOIR to resolve discrepancies between documents submitted with an EAD application and data pulled from EOIR systems;
- Leverage information sharing and IT systems to simplify the process of creating EADs and Forms I-94;
- Designate the IJ order granting asylum as acceptable evidence for Form I-9 employment verification purposes; and
- Consider a pilot program which places USCIS immigration services officers, having authority to provide USCIS documents to new asylees, in certain immigration courts.

### Eliminating Barriers to Obtaining Proof of Employment Authorization for Asylum Applicants in Removal Proceedings

Asylum seekers, particularly those in removal proceedings (defensive asylum applicants), encounter barriers to obtaining proof of their employment authorization, both while their Form I-589, *Application for Asylum and for Withholding of Removal*, is pending and after an immigration judge grants asylum. These barriers arise in part because the asylum process is split between USCIS and the Department of Justice’s Executive Office for Immigration Review (EOIR), with each agency having different powers in the process. Although EOIR has jurisdiction over defensive asylum applicants and an immigration judge (IJ) grants asylum to eligible applicants, they must apply to USCIS for an EAD and/or a Form I-94, *Arrival/Departure Record*, that demonstrates the grant of asylum.

USCIS often denies EAD applications filed by eligible defensive asylum applicants because it cannot find evidence of the pending asylum application in its systems or EOIR’s systems, which results in applicants having to submit multiple filings and endure extensive processing delays while attempting to resolve the issue. Meanwhile, those granted asylum by an IJ are instructed to call the USCIS Contact Center to request an appointment at their local USCIS field office to obtain a Form I-94. However, COVID-19 pandemic measures, contract cuts, and other measures taken by USCIS in response to its financial challenges have made certain customer services more difficult to access. USCIS should consider the following recommendations to decrease delays in processing EADs and in providing evidence of status:

### USCIS’ Digital Strategy: Nearing an Inflection Point

While there is still much more work to be accomplished, the CIS Ombudsman is optimistic that USCIS’ digital strategy is nearing an inflection point. In 2021, USCIS added two high-volume forms to its online offerings: Form I-765, *Application for Employment Authorization*, and Form I-821, *Application for Temporary Protected Status*. Other frequently filed petitions and applications are slated for release in the coming year. Furthermore, in September 2021, USCIS presented Congress with its plan to make online filing available for all forms and back-end digital processing by the end of Fiscal Year (FY) 2026. As reported by the DHS Office of Inspector General, this end cannot come soon enough, as many of the disruptions to USCIS’ operations, lengthening processing times, and growing backlogs were related to the agency’s failure to fully digitize before the COVID-19 pandemic struck in 2020.

USCIS reported that there are over 8 million active accounts in myUSCIS, its public facing portal that allows filers and their representatives to open online accounts to file, view, and manage their filings electronically. Through these accounts, USCIS received approximately 1,325,000 online-filed benefit requests in FY 2021. Although USCIS has not yet implemented automation, machine processing, or artificial intelligence tools and programming on a large-scale basis, the promise exists that it will do so successfully in the future. The CIS Ombudsman is resolved to monitor progress on this issue in the coming years.

The CIS Ombudsman provides three new recommendations:

- Make application programming interface (API) integration and digitization of Form I-912, *Request for Fee Waiver*, immediate priorities;

- Develop and initiate a targeted, nationwide promotion campaign to encourage more filers to create and use a myUSCIS account to file online and communicate with USCIS; and
- Examine how it might better incentivize customers to submit their filings online, including potentially increasing the current \$10 filing fee discount.

The CIS Ombudsman reasserts a recommendation it made in its 2021 Annual Report:

- Create a central portal and system to receive and forward Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, to the USCIS office that has the relevant benefit file.

### U Nonimmigrant Status Bona Fide Determination Process: Successes and Challenges in Taking on a Backlog

The Immigration and Nationality Act (INA) empowers victims to report crimes to the police while simultaneously providing law enforcement with the tools to investigate and prosecute the perpetrators of those crimes. The INA was amended by the Victims of Trafficking and Violence Protection Act of 2000 and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 to allow victims who assist law enforcement with the criminal investigation to apply for a U nonimmigrant visa by filing Form I-918, *Petition for U Nonimmigrant Status*, and receive deferred action and employment authorization. However, due to high demand for U visas, processing times have increased. To alleviate the negative effects caused by these backlogs, USCIS implemented the Bona Fide Determination (BFD) process on June 14, 2021. The BFD process allows USCIS to provide eligible petitioners with employment authorization and deferred action more expeditiously. Although USCIS experienced several challenges during implementation, the BFD process is proving to be a backlog management success.

## KEY FINDINGS AND COMMONALITIES MOVING FORWARD

During the reporting period, the harmful impacts of backlogs and lengthy processing delays underscored the need for USCIS to:

- Expand flexibility in providing work and travel documents to eligible requestors;
- Make the expedite process more efficient and consistent;
- Undertake new operational approaches to address the affirmative asylum backlog;
- Continue robust digitization efforts; and
- Apply successes, such as in the U BFD process, to other programs.

By focusing on these key objectives moving forward, USCIS will be better positioned to respond to challenges faced by both stakeholders and the agency itself when backlogs exist. While USCIS ultimately requires additional revenue to address resource constraints, this year's Annual Report contains more immediate recommendations to reduce pain points experienced by stakeholders and the agency. They will better allow USCIS to focus resources on adjudications, as opposed to fielding and responding to the cascading stakeholder inquiries and complaints that such processing delays produce. The CIS Ombudsman will continue to engage with USCIS and stakeholders on these issues and put forward practical solutions that will remove barriers and improve the administration of our immigration laws.

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# The Avalanche Impact of Backlogs: 2021 IN REVIEW

## RESPONSIBLE DIRECTORATES

Office of the Chief Financial Officer, Office of Policy and Strategy, Service Center Operations, Field Operations, Refugee, Asylum and International Operations

## INTRODUCTION

“Every single applicant who seeks a benefit from USCIS should get an answer—be it yes or no—in a reasonable amount of time.” —*USCIS Director Ur M. Jaddou, testifying before the U.S. House of Representatives, Committee on Appropriations, Subcommittee on Homeland Security, April 6, 2022.*

The year 2021 was an unwelcome watershed for U.S. Citizenship and Immigration Services (USCIS). As the agency tried to work its way out of the pandemic, it was confronted with the reality of its largest challenge: its own significant backlogs. Longer-than-normal processing times among certain applications and petitions have existed at USCIS since the agency succeeded the Immigration and Naturalization Service (INS). However, adjudication backlogs have never been this systemic nor this significant. The perfect storm of decreases in resources, increases in filings, and the physical limitations imposed by the pandemic has resulted in longer processing times for virtually every product line handled by the agency.

This not only creates or exacerbates adverse impacts on individuals seeking benefits (and the adjudicators who process them) but has significant “snowball” effects. Each delayed application creates a need for workarounds to mitigate the delay’s impact, resulting in these individuals seeking expedites, applying for additional benefits to bridge the gap created by the backlog, and generally dealing with the effects of the lack of action. For the individual filer, the pain is immediate and often severe: lost jobs and the

benefits attached to them (both temporary and permanent), lost societal benefits such as driver’s licenses, lost safety net benefits, and similar losses—to say nothing of the anxiety, stress, and depression they experience. It has significant impact on the agency as well, resulting in more time spent tracking and responding to applicants’ and petitioners’ workaround efforts to maintain status and employment while primary applications and petitions remain unadjudicated. It also impacts supporting functions like the Contact Center, congressional offices helping applicants, and the CIS Ombudsman, which saw a 79 percent spike in requests for case assistance in 2021 over the previous year.<sup>1</sup>

This article examines how the agency arrived at the crisis of backlogs which is now threatening to overwhelm it and highlights some of the steps it is taking to overcome this challenge. Specifically, it focuses not only on the backlogs themselves, but on the many cascading issues that echo through the system as a direct result of extended processing times. It challenges USCIS to address both the symptoms and the underlying problems that created these backlogs in the first place. And it sets the stage for all of the snowball effects discussed throughout this Annual Report, including some of the most pervasive problems the agency currently faces, and the many recommendations the CIS Ombudsman makes to address them.

## DEFINING A BACKLOG

*How USCIS Defines A Backlog.* USCIS has a very specific definition for what constitutes a backlog. The agency defines its “net” backlog as the volume of forms (referred to as “receipts”) that exceed processing time goals. This volume does not include the applications and petitions that are in a suspended status because they are outside the control of the agency (for example, waiting for a response to a request for evidence (RFE) or naturalization applications pending re-examination) or are not ready for adjudication (for example, where an immigrant visa is not available).<sup>2</sup> It is important to note the agency distinguishes between what it considers a backlog and its total pending caseload. The agency’s total caseload is not its backlog. Rather, it generally defines a backlog as the portion of its total inventory of pending cases that is outside its processing

goals for that form type.<sup>3</sup> Until very recently, the last time USCIS articulated processing goals was in 2007.<sup>4</sup>

The agency also measures both “processing times” and “cycle times.” Processing times represent the average amount of time it takes USCIS to process a particular form type, measured from when the agency receives the application until a decision is made on the case.<sup>5</sup> Cycle times, by contrast, measure how many months’ worth of pending cases of a particular form are awaiting a decision.<sup>6</sup> While cycle times are not processing times, they foreshadow improvements in processing times; cycle times are generally comparable to the agency’s median processing times.

*Arriving At The Present State.* Managing backlogs is not a new experience for the agency. USCIS came into existence with a backlog elimination plan that INS had developed several years prior in the wake of increasing processing times across several key applications, including applications for permanent residence.<sup>7</sup> Despite efforts to reduce the backlogs, these processing times grew once again due to post-9/11 security policies and new practices for screening applicants more closely. While the agency has varied in its practices and its calculations of what constitutes a backlog, it has consistently had backlogs ever since.

New programs and policies in the last two decades also have added to backlogs and processing times. Many factors outside of the agency’s control have increased

<sup>1</sup> The CIS Ombudsman received 14,618 requests for case assistance in 2020. In 2021, the CIS Ombudsman received 26,097 requests for case assistance.

<sup>2</sup> USCIS, “Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security, Fiscal Year 2020” (Feb. 17, 2021) p. iii fn. 3; <https://www.uscis.gov/sites/default/files/document/data/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS-FY20-Signed-Dated-2-17-21.pdf> (accessed May 8, 2022).

<sup>3</sup> “A backlog is defined as the volume of pending applications that exceed the level of acceptable pending cases. The acceptable pending inventory is pegged to the volume of applications receipted during the target cycle time period (e.g., five months). The target cycle time refers to the processing time goal for a given application type. For example, if the processing time goal for Form N-400, Application for Naturalization is five months, then the acceptable pending volume will be equal to the last five months’ worth of receipts.” Information provided by USCIS (May 10, 2022); see also DHS Office of Inspector General, “Continued Reliance on Manual Processing Slowed USCIS’ Benefits Delivery during the COVID-19 Pandemic,” OIG-22-12 (Dec. 2021), p. 9 fn. 20; <https://www.oig.dhs.gov/sites/default/files/assets/2022-01/OIG-22-12-Dec21.pdf> (accessed May 19, 2022).

<sup>4</sup> “Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule,” 72 Fed. Reg. 29851, 29857, 29858-59 (May 30, 2007)(the 2007 Fee Rule). USCIS recommitted to those processing goals for most applications and petitions in its 2016 Fee Rule. See “U.S. Citizenship and Immigration Services Fee Schedule,” 81 Fed. Reg. 73292, 73308 (Oct. 24, 2016)(“[T]he agency holds the 2007 processing goals to be among its highest priorities and recommits to achieving them as quickly as possible.”)

<sup>5</sup> USCIS News Release, “USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders” (Mar. 29, 2022); <https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work> (accessed May 5, 2022).

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., “USCIS Backlog Elimination Plan: Update” (Jun. 16, 2004); <https://www.aila.org/File/DownloadEmbeddedFile/44829> (accessed Apr. 12, 2022); E. Schmitt, “Backlog and Wait for Green Card Decline,” *The New York Times* (Jan. 19, 2002); <https://www.nytimes.com/2002/01/19/us/backlog-and-wait-for-green-card-decline.html> (accessed Apr. 14, 2022)(“Even as the number of immigrants seeking permanent residency in the United States grows, the backlog and waiting times for applicants have declined for the first time in seven years....”)

the number of applications. New laws have created new classifications (or subcategories within existing classifications) of eligible applicants, adding to existing caseloads.<sup>8</sup> International actions have also played a significant role in developing backlogs, as political activities or humanitarian crises can create new populations eligible for some form of immigration relief.<sup>9</sup> Whether it is the influx of asylum-seekers along the southern border or the addition of countries to Temporary Protected Status (TPS), USCIS has moved resources to accommodate these activities and has not replaced the resources in all cases. This is particularly true in humanitarian programs, where fees commensurate with the cost of adjudicating the applications either are not collected or are reduced as a matter of law or policy.<sup>10</sup>

USCIS has also taken actions that adversely impacted processing times. Changes in policies can (intentionally or not) expand or restrict eligibility criteria, both of which can lead to new cases as more applicants qualify or longer processing times. Every policy change has an impact, even if it does not result in additional inventory, since adjudicators may send more RFEs or notices of intent to deny as they adjust to changes in the adjudicative process. The change requiring in-person interviews for more applicants for permanent residence and the rescission (and eventual resurrection) of the so-called “deference” policy are two recent examples of policy changes leading to increased RFEs and longer processing times.<sup>11</sup>

The agency readily acknowledges that the increase in processing times, and the growth of backlogs, is a complex problem years in the making. Agency leadership has noted additional factors that contributed to the backlog since before the COVID-19 pandemic, including people

submitting more forms, insufficient staffing and facility resources to keep up with increased receipts, as well as the learning curves that lead to temporary productivity lags associated with adopting new case processing systems.<sup>12</sup>

In March 2020, the agency and its customers faced another challenge in the response to the COVID-19 pandemic which shut down all-in person operations and appointments. Even though USCIS sought to return to in-person activities as quickly as possible and began reopening activities as early as June 2020, there were repercussions across the agency. The necessity of remote work increased already-existing backlogs for many of the applications that USCIS did not yet process online.<sup>13</sup> USCIS had to move the physical files to adjudicators with protocols in place minimizing the number of staff who could provide physical support (i.e., providing hard copy files to adjudicators).<sup>14</sup> Fewer people providing support meant fewer support activities that required in-person appearances, leading to fewer interviews and fewer completions despite efforts to reprioritize and innovate.<sup>15</sup> Thousands of appointments then needed rescheduling, which took months to accomplish given the limited availability amid pandemic protocols. The ultimate impact: fewer completions, spread over a longer period of time. The predictable result: increases in adjudication delays throughout the agency.

The COVID-19 pandemic in 2020 and 2021 had additional adverse implications for processing times. The lack of revenue in the first few months of the pandemic, resulting from a dip in application receipts, compounded existing

<sup>8</sup> For example, the Liberian Refugee Immigration Fairness program, contained in the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), created a category for certain Liberian nationals, spouses, unmarried children under 21 years old, and unmarried sons and daughters 21 years old or older who were living in the United States and who met the eligibility requirements for applying for and obtaining lawful permanent resident status. See USCIS Policy Alert PA-2020-08, “Liberian Refugee Immigration Fairness” (Apr. 7, 2020); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200407-LRIF.pdf> (accessed May 8, 2022). The program was extended into 2021. See Section 901 of Division O, Title IX of the Consolidated Appropriations Act, 2021, § 901, Pub. L. 116-260; 8 USC § 1255 note (2020).

<sup>9</sup> See, e.g., “Designation of Venezuela for Temporary Protected Status and Implementation of Employment Authorization for Venezuelans Covered by Deferred Enforced Departure,” 86 Fed. Reg. 13574 (Mar. 9, 2021).

<sup>10</sup> The most recent example of this is the implementation of the Ukrainian parole program, “Uniting for Ukraine,” the administration of which requires the expenditure of funds without corresponding fees. See USCIS Web page, “Uniting for Ukraine,” May 6, 2022; <https://www.uscis.gov/humanitarian/uniting-for-ukraine> (accessed May 8, 2022).

<sup>11</sup> Compare, for example, the median processing time for an employment-based Form I-485, *Application to Register Permanent Residence or Adjust Status*, in 2017 (7.0 months) and 2022 (10.3 months). See USCIS Web page, “Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year Fiscal Year 2017 to 2022 (up to April 30, 2022);” <https://egov.uscis.gov/processing-times/historic-pt> (accessed May 20, 2022).

<sup>12</sup> “United States Citizenship and Immigration Services FY 2023 Budget Request” before the Subcommittee on Homeland Security of the House of Representatives Comm. on Appropriations, 117th Cong. 2nd Sess. (2022) (written testimony of Ur M. Jaddou, Director of USCIS); <http://docs.house.gov/meetings/AP/AP15/20220406/114604/HHRG-117-AP15-20220406-SD001.pdf> (accessed Apr. 14, 2022); see also DHS Office of Inspector General, “Continued Reliance on Manual Processing Slowed USCIS’ Benefits Delivery during the COVID-19 Pandemic,” OIG-22-12 (Dec. 2021); <https://www.oig.dhs.gov/sites/default/files/assets/2022-01/OIG-22-12-Dec21.pdf> (accessed May 14, 2022).

<sup>13</sup> DHS Office of Inspector General, “Continued Reliance on Manual Processing Slowed USCIS’ Benefits Delivery during the COVID-19 Pandemic,” OIG-22-12, p. 10 (Dec. 2021); <https://www.oig.dhs.gov/sites/default/files/assets/2022-01/OIG-22-12-Dec21.pdf> (accessed May 14, 2022) (“Senior officials from the adjudicative directorates (FOD, RAO, and SCOPS) agreed that USCIS’ biggest operational challenge was the dependency on paper to process cases. Although office facilities began reopening in June 2020, staff had limited opportunities to obtain paper files and to perform several required in-office duties. For example, between March 2020 and May 2021, as the COVID-19 pandemic continued, staff had limited opportunities to accomplish traditional processing tasks such as printing and scanning documents, routing paper documents for supervisory review and signature, and mailing forms to applicants. Also, USCIS employees did not always have the necessary access to paper files and documents. Adjudication officers we interviewed stated that accessing paper files during office closures significantly slowed their pace of benefits delivery.”)

<sup>14</sup> *Id.* pp 10–11.

<sup>15</sup> *Id.*

financial issues in an agency almost entirely dependent on fees.<sup>16</sup> A proposed furlough of almost two-thirds of the employees was narrowly avoided in the summer of 2020, but it compounded the problems of both morale and hiring freezes that added to staff attrition.<sup>17</sup> A fee rule designed to restore balance and provide for revenue commensurate to actual spending ended in an injunction,<sup>18</sup> requiring the agency to continue to operate at a deficit. Meanwhile, people continued to file new applications, especially as the inability to travel led to more applications to maintain status and as delays in adjudicating already-pending applications gave way to more applications. By the end of FY 2021, the agency had adjudicated 1.8 million fewer applications than it received.<sup>19</sup>

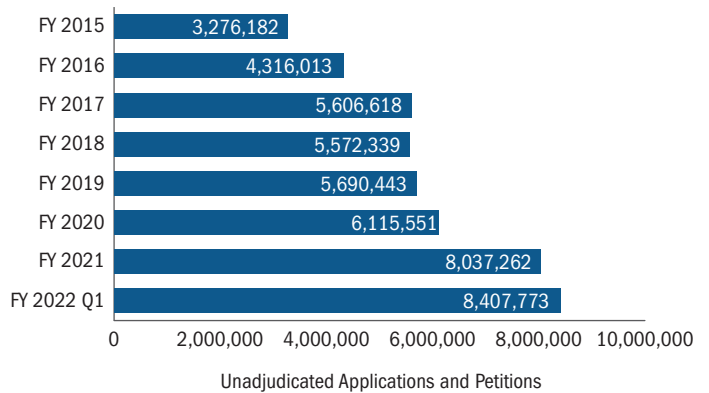
## THE RESULT: AN AVALANCHE OF IMPACTS

All these events have resulted in impacts on almost all of the pending adjudications at USCIS, creating an avalanche of consequences for the agency that requires even more resources. The inability to adjudicate an application for an extended period of time has a profound effect not only on that application but creates a downhill impact that can last for months or years. The agency experienced these effects through all of 2021 and into 2022, as unadjudicated applications continued to languish despite increases in on-site staffing and led to a multitude of additional issues. Lockbox personnel limits in October 2020 to maintain social distancing were directly responsible for months-long receipt delays at a time when USCIS was receiving high levels of adjustment of status applications.<sup>20</sup> Limits on the number of employees allowed to access federal records centers also limited the transfer of files that USCIS needed to complete adjudicating Form N-400, *Application for Naturalization*, and other forms—until a backlog of over 300,000 files had grown, leading to additional delays

in naturalization adjudications.<sup>21</sup> Fewer appointments at Application Support Centers to collect biometrics created backlogs of thousands of applications remaining incomplete.

Director Jaddou has acknowledged that as of April 2022, the inventory of unadjudicated applications and petitions stood at 8.5 million, with over 5 million pending beyond published processing times.<sup>22</sup>

**Figure 1.1**  
USCIS Pending Inventory



Sources: USCIS, “Number of Service-wide Forms by Quarter, Form Status, and Processing Time, FY 2022, Q1 (October 1, 2021–December 31, 2021)” (Mar. 9, 2022); [https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2022\\_Q1.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2022_Q1.pdf) (accessed May 9, 2022); “Number of Service-wide Forms by Quarter, Form Status, and Processing Time, FY 2021, Q4” (Dec. 15, 2021); [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf) (accessed May 7, 2022); “Number of Service-wide Forms by Fiscal Year to date by Quarter and Form Status, FY 2020” (Jan. 25, 2021); [https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2020Q4.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2020Q4.pdf) (accessed May 9, 2022); “Number of Service-wide Forms by Fiscal Year to date by Quarter and Form Status, FY 2019” (Jan. 14, 2020); [https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2019Q4.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2019Q4.pdf) (accessed May 9, 2022); “Number of Service-wide Forms by Fiscal Year to date, Quarter, and Form Status, FY 2018” (Feb. 26, 2019); [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY18Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY18Q4.pdf) (accessed May 9, 2022); “Number of Service-wide Forms by Fiscal Year to date, Quarter, and Form Status, FY 2017” (Dec. 7, 2017); [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY17Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY17Q4.pdf) (accessed May 9, 2022); “Number of Service-wide Forms by Fiscal Year to date, Quarter, and Form Status, FY 2016” (Dec. 23, 2016); [https://www.uscis.gov/sites/default/files/document/data/all\\_forms\\_performancedata\\_fy2016\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/document/data/all_forms_performancedata_fy2016_qtr4.pdf) (accessed May 9, 2022); “Number of Service-wide Forms by Fiscal Year to date, Quarter, and Form Status, FY 2015” (Dec. 4, 2015); [https://www.uscis.gov/sites/default/files/document/data/all\\_forms\\_performancedata\\_fy2015\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/document/data/all_forms_performancedata_fy2015_qtr4.pdf) (accessed May 9, 2022).

The agency quickly recognized some of these pain points and took quick action to contend with their effects. In July 2021, USCIS eliminated the need for so-called

<sup>16</sup> See CIS Ombudsman’s Annual Report 2021, pp. 8–10.

<sup>17</sup> *Id.*

<sup>18</sup> See *Immigrant Legal Resource Center et al. v. Chad F. Wolf*, 491 F. Supp. 3d 520 (N. D. Cal. 2020). See also *Northwest Immigrants’ Rights Project v. USCIS*, 496 F. Supp. 3d 31 (D.D.C. 2020).

<sup>19</sup> Muzaffar Chishty and Julia Gelatt, “Mounting Backlogs Undermine U.S. Immigration System and Impede Biden Policy Changes,” Migration Policy Institute (Feb. 23, 2022); <https://www.migrationpolicy.org/article/us-immigration-backlogs-mounting-undermine-biden> (accessed May 7, 2022).

<sup>20</sup> In October 2020, as a result of both the injunction against the 2020 Fee Rule and changes in the employment-based immigrant visa priority dates, the agency was inundated with thousands of applications, including applications for adjustment of status and ancillary requests (such as Form I-131, *Application for Travel Document*, and Form I-765, *Application for Employment Authorization*). Because the lockboxes receiving such applications were still maintaining necessary COVID-19 protocols promoting social distancing, USCIS took several months to receipt and process these applications, adding further to both its inventory and backlog of such applications. In its requests for case assistance, the CIS Ombudsman observed that this group of applications took many months longer than typical to be processed. See CIS Ombudsman’s Annual Report 2021, p. 11.

<sup>21</sup> M. Hackman, “With Paperwork Locked Underground, Thousands of U.S. Citizenship Applicants Wait and Wait,” *The Wall Street Journal* (Jan. 24, 2022); <https://www.wsj.com/articles/with-paperwork-locked-underground-thousands-of-u-s-citizenship-applicants-wait-and-wait-11643025603> (accessed May 8, 2022).

<sup>22</sup> “United States Citizenship and Immigration Services FY 2023 Budget Request” before the Subcommittee on Homeland Security of the House of Representatives Comm. on Appropriations, 117th Cong. 2nd Sess. (2022) (written testimony of Ur M. Jaddou) (accessed Apr. 14, 2022).



“bridge” applications by those seeking student status, meaning applicants for a change of status to F-1 student no longer needed to apply to change or extend their nonimmigrant status while the initial F-1 change of status application was pending.<sup>23</sup> As discussed in more detail below, USCIS also extended employment authorization document (EAD) validity periods. In May 2021, the agency temporarily suspended the collection of biometrics for certain applicants requesting an extension of stay in or change of status to H-4, L-2, and E nonimmigrant status.<sup>24</sup> In December, it reverted to its long-standing practice of making case-by-case determinations of interviews for petitioners of derivatives of asylees rather than requiring interviews in every case, as had been imposed the year before.<sup>25</sup>

While the agency has taken these steps and more to eradicate the worst of these operational dilemmas, much remains unresolved.

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## THE NET RESULTS OF NET BACKLOGS

The resulting pain points of unadjudicated applications have a very real impact on applicants and petitioners. Case backlogs “can trap individuals in limbo for months or years, with enormous implications for themselves, their families, employers, and the U.S. immigration system writ large, which suffers when it lacks transparency and predictability.”<sup>26</sup> Stuck while waiting for USCIS to adjudicate their benefit requests, applicants still need to maintain legal immigration status, which can become a substantial task. Renewing ancillary benefits such as EADs and advance parole requires vigilance; even when filed on time, these renewal applications are also caught up in the same backlogs and can be delayed long beyond the previous validity period or any auto-renewal period.

*The Primary Losses for Customers.* The loss of employment in particular has had a substantial adverse

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<sup>23</sup> USCIS News Alert, “Applicants for Change of Status to F-1 Student No Longer Need to Submit Subsequent Applications to ‘Bridge the Gap’” (Jul. 20, 2021); <https://www.uscis.gov/news/alerts/applicants-for-change-of-status-to-f-1-student-no-longer-need-to-submit-subsequent-applications-to> (accessed Apr. 15, 2021).

<sup>24</sup> USCIS News Alert, “USCIS Temporarily Suspends Biometrics Requirement for Certain Form I-539 Applicants” (May 13, 2021); <https://www.uscis.gov/news/alerts/uscis-temporarily-suspends-biometrics-requirement-for-certain-form-i-539-applicants> (accessed Apr. 15, 2022).

<sup>25</sup> USCIS News Alert, “USCIS Reverts to Previous Criteria for Interviewing Petitioners Requesting Derivative Refugee and Asylee Status for Family Members” (Dec. 10, 2021); <https://www.uscis.gov/newsroom/alerts/uscis-reverts-to-previous-criteria-for-interviewing-petitioners-requesting-derivative-refugee-and> (accessed Apr. 15, 2022).

<sup>26</sup> Muzaffar Chishti and Julia Gelatt, “Mounting Backlogs Undermine U.S. Immigration System and Impede Biden Policy Changes,” *Migration Policy Institute* (Feb. 23, 2022); <https://www.migrationpolicy.org/article/us-immigration-backlogs-mounting-undermine-biden> (accessed May 7, 2022).

influence on many lives. Despite USCIS beginning to transfer EAD applications to an online adjudications platform, processing times for EAD applications have slowed considerably. In 2021, the CIS Ombudsman received 6,500 requests for case assistance with EAD applications, almost all renewals or initial time-sensitive applications such as F-1 students seeking Optional Practical Training (OPT). For many of the renewals, the applicant had already been placed in unpaid leave status or had been terminated, resulting in significant economic loss for the individual, their family, and in many cases the employer. Despite the availability of expedite requests, the sheer number of such applications pending at the end of 2021 (1,562,467)<sup>27</sup> illustrates the agency’s inability to attend to what is usually a routine application.

There are many other costs to applicants and petitioners as well. The first is time. For example, most people must accrue a certain number of years in lawful permanent resident status before they may apply for naturalization. If USCIS does not adjudicate an adjustment of status application within a year after what is a “normal” processing time of 6 months, the applicant loses that year of lawful permanent resident status and must wait longer to apply for naturalization. A naturalization applicant may miss the chance to vote in an election while waiting for USCIS to adjudicate their Form N-400. A marriage that is entered into in good faith and is still valid when the participants seek to remove the conditions on their permanent residence may break down by the time USCIS considers the request years later. There are also the costs of additional applications to maintain their status: multiple EADs, multiple advance paroles, and multiple status extensions.

No less problematic is the stress created by the lack of closure—not knowing whether the application is held up for a reason that they cannot address, making multiple inquiries to obtain answers, and the frustration of being unable to move forward. Some of these challenges are themselves irrevocable. Children age out, would-be sponsored parents die, and marriages dissolve under the stress.

*The Loss to The Agency.* The true snowball effect of backlogs lies in the cost to the agency as well as its customers—both in terms of money lost and in the rebounding impacts across USCIS’ workload. USCIS pegs an application to a fee that is calculated, at best, according to the cost of adjudicating it in the year it is

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<sup>27</sup> USCIS Web page, “Immigration and Citizenship Data All USCIS Application and Petition Form Types (Fiscal Year 2022, 1<sup>st</sup> Quarter, October 1–December 31, 2021)” (Mar. 9, 2022); [https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2022\\_Q1.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2022_Q1.pdf) (accessed Apr. 15, 2022).

filed.<sup>28</sup> Inflation, cost of living, staff attrition, and other adjustments only increase the cost of actually adjudicating that application if USCIS does not touch it for a year, costing the agency additional money it cannot get from that application.<sup>29</sup>

The costs go beyond those measured in fees. Thousands of delayed applications lead directly to increases in expedite or emergency requests.<sup>30</sup> Delays lead to increases in requests for assistance from congressional offices and the CIS Ombudsman. In FY 2021, the USCIS Office of Legislative Affairs received 127,000 inquiries. The office had already received 99,103 congressional inquiries as of April 30, 2022, which means the agency is likely to receive almost 170,000 inquiries in FY 2022—a 34 percent increase over FY 2021.<sup>31</sup> Backlogs also lead to increased lawsuits and *writs of mandamus* to demand an immediate adjudication of benefit requests.

All of these activities divert adjudicator time away from actually adjudicating applications as they instead answer questions, handle expedites, and work with legal counsel. They also increase other applications; advance parole applications, for example, that go unadjudicated result in requests for emergency parole for unavoidable travel.<sup>32</sup> Backlogs can also lead to increases in class-action litigation to address the problem holistically. Such litigation, however, sometimes leads to settlements which create requirements (usually adjudication deadlines) that USCIS must meet, often by diverting resources to the deadline which increases processing times elsewhere.

*Quick Fixes Cannot Fully Address A Backlog This Systemic.* USCIS has publicly recognized the rising tide of backlogged applications and petitions. By the end of FY 2006, USCIS noted that its backlog had fallen from a high of 3.8 million cases in January 2004 to less than 10,000.<sup>33</sup> In 2019, testifying before Congress, USCIS noted that their volume of backlogged cases made up 43

percent of the agency's total pending caseload.<sup>34</sup> In early 2022, the backlog had increased to 5.3 million pending applications and petitions of a total pending inventory of 8.3 million, or 64 percent of its caseload.<sup>35</sup>

Both the Administration and Congress have recognized the need to provide additional resources to address this problem. Congress recently provided approximately \$250 million for processing applications, reducing backlogs at asylum, field, and service center offices, and supporting the refugee program.<sup>36</sup> This money will go a long way in funding essential backlog reduction activities, and USCIS is already putting this money to good use. However, to achieve backlog reduction, the agency needs more than a one-time infusion.

## USCIS NEEDS TO ADDRESS BOTH THE SYMPTOMS AND THE BACKLOGS

While the agency is doing much to reduce its backlogs, it is unlikely to change quickly or even as immediately as the agency intends. Focusing only on reducing the backlogs themselves fails to timely address the systemic problems that backlogs have created. The agency must continue to address both.

Agency experts have identified, categorized, and quantified the underlying causes, and USCIS management has publicly acknowledged the problems that have led to this historic level of pending cases.<sup>37</sup> Most recently, Director Jaddou has focused on the fiscal and other challenges in ensuring sufficient staffing for USCIS' caseload.<sup>38</sup> After an almost 2-year hiring freeze, the agency has focused on an

<sup>28</sup> In fact, this is a best-case scenario; as discussed in the CIS Ombudsman recommendation on the fee-for-service model, summarized *infra*, the fee study cycle employed by USCIS can mean that fees are based on cost calculations from 1 to 2 years prior.

<sup>29</sup> For more discussion on this topic, please see the summary of the CIS Ombudsman recommendation on the fee for service model, *infra*.

<sup>30</sup> For more discussion on this topic, see "Improving Access to the Expedite Process," *infra*.

<sup>31</sup> Information provided by USCIS (May 10, 2022).

<sup>32</sup> For more discussion of this topic, please see "Increasing Accessibility to Legitimate Travel: Advance Parole," *infra*.

<sup>33</sup> "Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule," 72 Fed. Reg. at 29857 (2007 Fee Rule).

<sup>34</sup> See "Hearing on Policy Changes and Processing Delays at USCIS," before the Subcommittee on Immigration and Citizenship of the U.S. House Committee on the Judiciary, 116th Cong. 1st Sess. (Jul. 16, 2019) joint written statement of Don Neufeld, Associate Director, Service Center Operations Directorate, USCIS; Michael Valverde, Deputy Associate Director, Field Operations Directorate, USCIS; and Michael Hoefler, Chief, Office of Performance and Quality, Management Directorate, USCIS); <https://docs.house.gov/meetings/JU/JU01/20190716/109787/HHRG-116-JU01-Wstate-NeufeldD-20190716.pdf> (accessed Apr. 14, 2022).

<sup>35</sup> "United States Citizenship and Immigration Services FY 2023 Budget Request" before the Subcommittee on Homeland Security of the House of Representatives Comm. on Appropriations, 117th Cong. 2nd Sess. (2022) (written testimony of Ur M. Jaddou) (accessed Apr. 14, 2022).

<sup>36</sup> Extending Government Funding and Delivering Emergency Assistance Act, § 132, Pub. L. No. 117-43 (2021).

<sup>37</sup> "Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants," 87 Fed. Reg. 26614 (May 4, 2022).

<sup>38</sup> "United States Citizenship and Immigration Services FY 2023 Budget Request" before the Subcommittee on Homeland Security of the House of Representatives Comm. on Appropriations, 117th Cong. 2nd Sess. (2022) (written testimony of Ur M. Jaddou) (accessed Apr. 14, 2022). Director Jaddou noted the inherent need for more employees to meet the current challenges: "Our employees are dedicated, innovative, and hardworking... Today, there are simply not enough of them."

ambitious hiring goal of 4,400 positions by December 31, 2022, with an even more ambitious goal of having these employees on board by the end of December 2022.<sup>39</sup>

USCIS has also set aggressive backlog reduction goals. On March 29, 2022, USCIS announced new internal “cycle time” processing goals to reduce its pending caseload. These goals establish benchmarks for how long it should take the agency to process cases. While they are not processing time goals, USCIS stated that “as cycle times improve, processing times will follow, and applicants and petitioners will receive decisions on their cases more quickly.”<sup>40</sup> The agency aims to achieve these cycle times by the end of FY 2023. However, there is significant disparity at this time between these cycle time goals and the most recently announced medians. See Figure 1.2 (*USCIS FY 2023 Cycle Time Goals In FY 2022 Context*).

These averages do not necessarily represent the extent of the challenges the agency will face as it works to reach its stated goals in the next 2 years. For example, the current median processing time for Form I-485 for asylees is 23.2 months, well above the average for all adjustment applications. USCIS can introduce additional premium processing lines of business but doing so cannot impact the processing time goals. This is perhaps the primary reason USCIS made it clear that any new premium processing would be phased in and depend heavily on its ability to meet the congressional mandate to ensure sufficient resources for non-premium filings. The agency also cannot plan for the impact of initiatives imposed by future legislative and executive actions. While the staff of USCIS is dedicated to its mission, it will take more than dedication to reach these targets.

**Figure 1.2**  
USCIS FY 2023 Cycle Time Goals In FY 2022 Context

Form Type	Receipts in FY 2021	Current Median Processing Time (in months)	FY 2023 Cycle Time Goal (in months)	Inventory Pending as of December 31, 2021
I-765 (all types)	2,606,402	4.8	3	1,562,467
N-400	809,338	11.2	6	792,416
I-90	804,279	1.1	6	725,418
I-130 (receipts/inventory for all types; processing times for immediate relatives)	757,206	9.5	6	1,585,539
I-485 (all types)	712,297	13.4	6	789,426
I-131 (advance parole)	595,977	7.2	3	411,473
I-129 (all types)	533,684	3.1	2	89,068
I-821D (renewals)	438,950	0.6	6	119,249
I-589	61,158	n/a	No goal set	432,341
I-821	301,778	8.6	No goal set	313,852

Sources: Data calculated from “Number of Service-wide Forms by Quarter, Form Status, and Processing Time, FY 2021, Q4” (Dec. 15, 2021); [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf) (accessed May 7, 2022); “Number of Service-wide Forms by Quarter, Form Status and Processing Time, FY 2022, Q1” (October 1, 2021–December 31, 2021)(Mar. 9, 2022); [https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2022\\_Q1.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2022_Q1.pdf) (accessed May 7, 2022); “Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year, Fiscal Year 2017 to 2022 (up to March 31, 2022);” <https://egov.uscis.gov/processing-times/historic-pt> (accessed May 7, 2022); USCIS News Release, “USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders” (Mar. 29, 2022); <https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work> (accessed May 5, 2022).

To its credit, agency leadership is not leaving this to chance. They have set interim goals to ramp up adjudication efficiencies, learn from their implementation, and prioritize specific form types. USCIS has said it is planning to “focus its backlog reduction efforts on the listed forms that total 2.7 million, or 61 percent, of the net backlog [of 4.3 million].”<sup>41</sup> These projections, however, total only approximately 22 percent of the total number of these form types in the net backlog.

<sup>39</sup> Information provided by USCIS (Apr. 19, 2022).

<sup>40</sup> USCIS News Release, “USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders” (Mar. 29, 2022); <https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work> (accessed May 5, 2022).

<sup>41</sup> Information provided by USCIS (May 10, 2022).

**Figure 1.3**  
USCIS Backlog Reduction Metrics FY 22

Form	Pending Cases	Net Backlog	Outside Govt. Control	FY22 Appropriation Projected Completions
I-130 Immediate Relative	504,822	232,217	614	57,348
I-765	1,336,803	740,569	1,565	210,977
I-485 Asylee	87,997	76,033	114	18,347
I-485 Cuban	14,819	10,203	1,360	1,937
I-485 Employment	245,490	182,450	5,473	40,457
I-485 Family	349,350	206,323	24,719	33,991
I-485 Other	47,747	28,965	2,360	8,832
I-485 Refugee	24,983	19,739	10	3,014
I-589	412,796	380,427	0	17,612
I-751	232,803	127,973	1,242	35,114
I-918 Waitlisting/ EAD Issuance*	264,193	227,289	24,854	75,702
N-400 Military	5,897	1,224	214	182
N-400 Regular	833,738	487,027	21,442	84,153
<b>Total</b>	<b>4,361,438</b>	<b>2,720,439</b>	<b>83,967</b>	<b>587,665</b>

Source: Information provided by USCIS (May 10, 2022).

\* Includes U nonimmigrant status Bona Fide Determination (BFD) cases.

## AGENCY ACTION TO MITIGATE THE PAIN POINTS

*Operational Changes.* USCIS has sought to implement many efficiencies to make processes easier, first and foremost in the EAD context—one of its largest volume applications and certainly one of the most time-sensitive. These changes have included:

- **EAD Process Changes**—USCIS has sought to implement several extensions of validity periods, extensions of auto-extension, and more flexibility for students, as well as rescinding previous guidance that imposed additional burdens. Among these:
  - *Easing burdens on students needing EADs:* F-1 students have narrow windows in which to file requests for EADs for OPT. USCIS took steps in 2021 and early 2022 to ease these burdens and enable students to meet the timelines, including extending deadlines and allowing them to refile if USCIS

rejected their form.<sup>42</sup> Students can now submit OPT applications online, which represents the first time USCIS has offered an online version of Form I-765, *Application for Employment Authorization*.<sup>43</sup>

- *Using online filing for EADs:* In addition to students, USCIS made online filing for EADs available to other populations, most recently Deferred Action for Childhood Arrivals (DACA) recipients seeking renewal.<sup>44</sup>
- *Extending validity periods:* USCIS extended validity periods of certain EADs, including those given to adjustment applicants (from 1 to 2 years)<sup>45</sup> and asylees, refugees, noncitizens granted withholding of deportation, and Violence Against Women Act (VAWA) self-petitioners (from 1 to 2 years).<sup>46</sup> Most significantly, the agency recently extended the automatic extensions of certain EAD renewal categories for up to 540 days.<sup>47</sup>
- *Easing the need to demonstrate status:* USCIS acknowledged the statutory eligibility of L and E spouses to work incident to status without further need for an EAD.<sup>48</sup> USCIS also expanded the categories of those eligible for hardship student

<sup>42</sup> USCIS News Alert, “USCIS Extends Flexibilities to Certain Applicants Filing Form I-765 for OPT” (Feb. 26, 2021); <https://www.uscis.gov/newsroom/alerts/uscis-extends-flexibilities-to-certain-applicants-filing-form-i-765-for-opt> (accessed Apr. 18, 2022).

<sup>43</sup> USCIS News Release, “F-1 Students Seeking Optional Practical Training Can Now File Form I-765 Online” (Apr. 12, 2021); <https://www.uscis.gov/news/news-releases/f-1-students-seeking-optional-practical-training-can-now-file-form-i-765-online> (accessed Apr. 18, 2022).

<sup>44</sup> USCIS News Release, “USCIS Announces Online Filing for DACA Renewal Forms” (Apr. 12, 2022); <https://www.uscis.gov/newsroom/news-releases/uscis-announces-online-filing-for-daca-renewal-forms> (accessed Apr. 18, 2022). See also USCIS News Release, “All Temporary Protected Status (TPS) Applicants May Now File Forms I-821 and I-765 Online” (Nov. 29, 2021); <https://www.uscis.gov/newsroom/alerts/all-temporary-protected-status-tps-applicants-may-now-file-forms-i-821-and-i-765-online> (accessed Apr. 18, 2022).

<sup>45</sup> USCIS Policy Alert, “Employment Authorization for Certain Adjustment Applicants,” PM-2021-10 (Jun. 9, 2021); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210609-EmploymentAuthorization.pdf> (accessed Apr. 19, 2022).

<sup>46</sup> USCIS Policy Alert, “Updating General Guidelines on Maximum Validity Periods for Employment Authorization Documents based on Certain Filing Categories,” PA-2022-07 (Feb. 7, 2022); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220207-EmploymentAuthorizationValidity.pdf> (accessed Apr. 19, 2022).

<sup>47</sup> “Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants,” 87 Fed. Reg. 26614 (May 4, 2022). For more information on this Temporary Final Rule and its impact, see “EADs,” *infra*.

<sup>48</sup> USCIS Policy Alert, “Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses” (Nov. 12, 2021); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20211112-EmploymentAuthorization.pdf> (accessed Apr. 19, 2022).

EADs, recognizing the efficiency of allowing students from certain countries experiencing national crises to apply.<sup>49</sup>

to the group of expedite requests it would consider, recognizing that these workers are also critical to combating the ongoing pandemic.<sup>54</sup>

■ Other Process Changes

- *Suspending biometrics requirements*: On May 17, 2021, USCIS temporarily suspended the requirement of taking biometrics for those requesting an extension of stay in or a change of status to H-4, L-2, and E nonimmigrant status on Form I-539, *Application to Extend/Change Nonimmigrant Status*.<sup>50</sup> This 2-year suspension was explicitly based on the delays in obtaining biometrics and the impact on these applicants.
- *Rescinding parole guidance*: USCIS rescinded previous guidance regarding employment authorization for parolees after the termination of a presidential proclamation that had given rise to the guidance.<sup>51</sup>
- *Deference policy*: USCIS reversed the 2017 rescission of the so-called “deference” policy. First implemented in 2004, the guidance states that adjudicators can, but are not required to, defer to a previous decision when adjudicating extension requests involving the same parties and facts unless there has been a material error, material change, or new material facts.<sup>52</sup>
- *Expedites*: On December 28, 2021, USCIS announced it would expedite the EADs of healthcare workers.<sup>53</sup> In March 2022, it added childcare workers

*New Approaches to Adjudications*. USCIS has significantly reassessed its case management and sought to move away from rote adjudication. For example, the agency has incorporated more technology in its adjudications. While the agency was chided for being unprepared for the pandemic because of the state of its online adjudication functionality,<sup>55</sup> it has attempted to use the pandemic to make substantial investments in moving forward with its digital strategy. For some time, USCIS focused on automated pre-processing functions to help it assess both those types of applications with more risk factors as well as those deserving of less scrutiny.<sup>56</sup> It is also applying tools like artificial intelligence and machine learning, which USCIS has used for customer service functions (such as Emma, the agency’s online virtual assistant), to adjudications. USCIS has streamlined processing for EADs and other form types to take advantage of these tools to automate parts of the adjudicative process.<sup>57</sup>

Specifically, USCIS launched a robotic process automation (RPA) project in 2019, the goal of which was to create an enterprise approach to improve efficiency and consistency in automating previously time-consuming manual tasks and workflows.<sup>58</sup> The Office of Information Technology (OIT) has implemented this RPA platform to automate technology designed to streamline the processing of applications, petitions, and customer support. Enhancements have included performing validations, such as of data elements in ELIS-platform adjudications (such as scanning pending Forms I-90, *Application to Replace Permanent Residence Card*, to eliminate those with an approved Form N-400). It also includes automating certain back-end tasks, from Contact Center confirmation of data elements to routing of calls to protection of sensitive applicants.

USCIS is also incorporating other non-IT measures, such as the risk-based approach recommended by the CIS Ombudsman in 2021 for interviews waivers for those seeking to remove the conditions on their permanent

<sup>49</sup> “Employment Authorization for Ukrainian F-1 Nonimmigrant Students Experiencing Severe Economic Hardship as a Direct Result of the Ongoing Armed Conflict in Ukraine,” 87 Fed. Reg. 23189 (Apr. 19, 2022); “Employment Authorization for Afghan F-1 Nonimmigrant Students Experiencing Severe Economic Hardship as a Direct Result of the Current Situation in Afghanistan,” 87 Fed. Reg. 30971 (May 20, 2022).

<sup>50</sup> USCIS News Alert, “USCIS Temporarily Suspends Biometrics Requirement for Certain Form I-539 Applicants” (May 13, 2021); <https://www.uscis.gov/news/alerts/uscis-temporarily-suspends-biometrics-requirement-for-certain-form-i-539-applicants> (accessed Apr. 19, 2022).

<sup>51</sup> USCIS Policy Alert, “Rescinding Guidance Discretionary Employment Authorization for Parolees,” PA-2021-18 (Aug. 12, 2021); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210812-EmploymentAuthorizationForParolees.pdf> (accessed Apr. 15, 2022).

<sup>52</sup> USCIS Policy Alert, “Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity,” PA-2021-05 (Apr. 27, 2021); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf> (accessed Apr. 19, 2022).

<sup>53</sup> CIS Ombudsman email message, “Healthcare Workers May Request Expedited Processing for Employment Authorization Documents” (Dec. 28, 2021) (in the possession of the CIS Ombudsman).

<sup>54</sup> Information provided by USCIS in an email message, “USCIS Guidance on Expedited EADs for Healthcare and Childcare Workers” (Mar. 21, 2022) (in the possession of the CIS Ombudsman).

<sup>55</sup> DHS Office of Inspector General, “Continued Reliance on Manual Processing Slowed USCIS’ Benefits Delivery during the COVID-19 Pandemic,” OIG-22-12 (Dec. 2021); <https://www.oig.dhs.gov/sites/default/files/assets/2022-01/OIG-22-12-Dec21.pdf> (accessed May 4, 2022).

<sup>56</sup> D. Nyczepir, “USCIS automating pre-processing of immigration case,” *Fedscoop* (Apr. 15, 2021); <https://www.fedscoop.com/uscis-automating-immigration-pre-processing/> (accessed May 7, 2022).

<sup>57</sup> Information provided by USCIS (Mar. 2, 2022).

<sup>58</sup> Information provided by USCIS (May 10, 2022).

residence.<sup>59</sup> This approach focuses resources where needed to improve processing times on one of the agency’s most notoriously backlogged adjudications, the Form I-751, *Application to Remove Conditions on Residence*, while still maintaining procedures to identify fraud, issues of national security, and public safety risk.<sup>60</sup>

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## RECOMMENDATIONS

This Annual Report is devoted to the pain points discussed above: the collective extra workloads, or snowball effects, resulting from lengthy processing times, which greatly burden customers and the agency. The agency cannot simply focus on its backlogs without also addressing the cascading challenges the backlogs create. While USCIS has taken many steps to alleviate some of these challenges, more can be done. This report identifies some additional steps to mitigate or even eliminate some of the most intransigent problems the backlogs create. Addressing issues such as advance parole, expedite requests, and EAD renewals will allow the agency to free up and focus resources on the backlogs themselves, especially on adjudications requiring a higher level of attention. Bringing the unprecedented backlogs down to a manageable level requires USCIS to apply efficiencies and streamline processing while still preserving integrity, and this cannot be done without increasing both staff and money.

The agency must have a reliable stream of fees and other sources of revenue sufficient for that purpose. The CIS Ombudsman recently issued a set of recommendations about USCIS’ current fee-setting processes. That study, referenced *infra*, discusses several options the agency can take to maintain a steady stream of revenue that allows it to manage its unpredictable and often crippling workload. Congress has allocated funding to specifically address some of these backlog problems, which has allowed USCIS to hire additional adjudicators. This funding stream needs to continue—to give the agency the breathing room it needs to address the infrastructure issues that continue to plague it and to do so without overburdening future applicants and petitioners. Fees must also reflect current conditions and especially the current costs inherent in meeting processing goals. Only then can backlogs and their associated impacts cease to exist.

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<sup>59</sup> USCIS News Alert, “USCIS Implements Risk-Based Approach for Conditional Permanent Resident Interviews” (Apr. 7, 2022); <https://www.uscis.gov/newsroom/news-releases/uscis-implements-risk-based-approach-for-conditional-permanent-resident-interviews> (accessed May 7, 2022).

<sup>60</sup> The median processing time for Form I-751 as of May 31, 2022 was 17.4 months; a processing time posted the same day for all field offices, however, states that 80 percent of cases are adjudicated in 31 months. *Compare* “Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year, Fiscal Year 2017 to 2022 (up to April 30, 2022);” <https://egov.uscis.gov/processing-times/historic-pt> (accessed May 31, 2022) with USCIS, “Case Status Processing Times,” “Processing Time for Form I-751;” <https://egov.uscis.gov/processing-times/> (accessed May 31, 2022).



# THE NEED FOR MORE FLEXIBILITY IN RENEWING EMPLOYMENT AUTHORIZATION

## RESPONSIBLE DIRECTORATES

Office of Policy and Strategy, Service Center Operations, Field Operations

## INTRODUCTION

U.S. employers depend on recruiting and retaining a stable workforce to meet their goals, while employees depend on uninterrupted work authorization to maintain steady income to support themselves and their families. Where eligible noncitizen workers are concerned, U.S. Citizenship and Immigration Services' (USCIS') ability to sustain this continuity is critical to U.S. businesses and employees alike.

Section 274A of the Immigration and Nationality Act (INA) makes it unlawful for employers to hire noncitizens who are not authorized to work in the United States.<sup>61</sup> Therefore, employers must verify that all prospective employees are authorized for employment. They do so by requiring prospective employees to present Form I-9, *Employment Eligibility Verification*, along with certain documentation

<sup>61</sup> See INA § 274A(a); 8 U.S.C. § 1324a(a).

proving their identity and employment authorization.<sup>62</sup> If the documents have an expiration date, the employer must re-verify the employee's eligibility to work no later than the date of expiration. At that time, the employee must present a document that shows current employment authorization.<sup>63</sup>

Regulations require noncitizens in certain immigration-related categories to obtain an Employment Authorization Document (also known as a Form I-766 or EAD) to establish employment authorization and satisfy Form I-9 requirements.<sup>64</sup> Generally, to apply for an EAD, an applicant files Form I-765, *Application for Employment Authorization*, with USCIS.<sup>65</sup> USCIS will issue an EAD that is valid for a finite period based on the applicant's eligibility category.

Currently, USCIS is experiencing an unprecedented backlog of benefit requests, including initial and renewal EAD applications. Delays in renewing EADs interrupt employment for noncitizens who have already proven themselves eligible while simultaneously interrupting the ability of U.S. businesses to employ their workforce continuously.<sup>66</sup>

## RECOMMENDATIONS

USCIS has committed to reducing EAD processing times.<sup>67</sup> As it seeks to do so, the CIS Ombudsman is focusing on improvements USCIS can make to allow for uninterrupted employment authorization for previously approved, still eligible individuals, regardless of current or future processing delays.<sup>68</sup>

<sup>62</sup> See INA § 274A(b); 8 U.S.C. § 1324a(b); and 8 C.F.R. § 274a.2(b)(1). See also USCIS Web page, "Form I-9, Employment Eligibility Verification" (Apr. 13, 2021); <https://www.uscis.gov/i-9> (accessed Apr. 26, 2022); USCIS Handbook for Employers, M-274 § 4.0 (Nov. 24, 2020); <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274> (accessed Apr. 26, 2022) (within 3 business days of the beginning of employment, the employee must present documents verifying identity and employment authorization).

<sup>63</sup> 8 C.F.R. § 274a.2(b)(4)(vii); USCIS Handbook for Employers, M-274 § 5.1 (Nov. 24, 2020); <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274> (accessed Apr. 26, 2022) ("You must reverify an employee's employment authorization no later than the date employment authorization expires.").

<sup>64</sup> 8 C.F.R. § 274a.12(c).

<sup>65</sup> USCIS Web page, "I-765, Application for Employment Authorization" (Apr. 22, 2022); <https://www.uscis.gov/i-765> (accessed Apr. 26, 2022).

<sup>66</sup> Information provided by stakeholders (Mar. 9, 2022).

<sup>67</sup> USCIS Press Release, "USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders" (Mar. 29, 2022); <https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work> (accessed Apr. 26, 2022).

<sup>68</sup> While these recommendations pertain largely to categories that require an EAD, we also make recommendations that affect other employment authorization categories that do not depend on having an EAD, as processing delays may have an impact on these categories as well. See 8 C.F.R. § 274a.12(b).

The CIS Ombudsman's recommendations to USCIS are to:

1. Build on existing automatic extension periods to allow for uninterrupted work authorization while waiting for USCIS to adjudicate a renewal EAD application.
2. Provide better options for nonimmigrant spouses to renew their employment authorization.
3. Allow applicants to file for renewal EADs earlier and issue renewal EADs with validity periods that begin when the original EAD expires.
4. Continue to expedite EAD renewals for workers in certain occupations in the national interest.
5. Continue to explore and augment the use of technology, including online filing and machine learning, to further automate EAD processing.
6. Consider new regulations that provide more flexibility for USCIS and approved workers during periods of backlogs or long processing delays.
7. Consider increasing flexibility in the Form I-9 process.
8. Consider eliminating the need for a separate EAD application when filing for certain benefits.

## BACKGROUND

The CIS Ombudsman last wrote about the EAD program in its 2019 Annual Report, focusing on ways that USCIS might reduce EAD processing times.<sup>69</sup> The intervening period has seen an increase in the number of EADs sought, adding to an already significant problem.

*Certain EAD Categories Make Up Half of the EAD Workload.* EAD applications based on a pending Form I-485, *Application to Register Permanent Residence or Adjust Status*,<sup>70</sup> or a pending Form I-589, *Application for Asylum and for Withholding of Removal*,<sup>71</sup> make up a substantial share of the EAD applications USCIS receives. Over the last 5 fiscal years, these categories have made up between 46 and 53 percent of the over 2 million EAD applications filed each year, with a 30 percent increase in overall filings (some 590,000 requests) from Fiscal Year (FY) 2020 to FY 2021 alone.

<sup>69</sup> CIS Ombudsman's Annual Report 2019, pp. 70–84.

<sup>70</sup> Also referred to as a "pending adjustment of status application" or "pending adjustment application."

<sup>71</sup> Also referred to as a "pending asylum application."



**Figure 2.1**

Top Categories of EADs, FY 17–21

Year	Total EAD applications	Total EAD applications based on pending Form I-485	Total EAD applications based on pending Form I-589	Total EAD applications based on pending Forms I-485 and I-589 (% of Total EAD applications)
FY 2021	2.59 million	769,673	601,493	1.37 million (52.9%)
FY 2020	2 million	560,013	495,882	1.06 million (53%)
FY 2019	2.19 million	608,426	556,996	1.17 million (53.4%)
FY 2018	2.14 million	645,107	332,320	977,427 (45.7%)
FY 2017	2.37 million	633,337	478,721	1.1 million (46.4%)

Source: USCIS Report, “Form I-765, Application for Employment Authorization, All Receipts, Approvals, Denials Grouped by Eligibility Category and Filing Type, FY 2003-2021” (Dec. 15, 2021); [https://www.uscis.gov/sites/default/files/document/data/I-765\\_Application\\_for\\_Employment\\_FY03-21.pdf](https://www.uscis.gov/sites/default/files/document/data/I-765_Application_for_Employment_FY03-21.pdf) (accessed Apr. 26, 2022).

As backlogs have grown for all types of USCIS forms, EADs in these categories have been impacted as well.

As of April 22, 2022, processing times listed on the USCIS website also reflected these processing delays:

**Figure 2.2**

Median Processing Times (in months) for Certain EAD Applications

Type	FY2017	2018	2019	2020	2021	2022 (as of 04/30/2022)
Pending Form I-485 (adjustment)	3	4.1	5.1	4.8	7.1	7.1
Pending Form I-589 (asylum)	1.7	.9	2	2.5	3.2	8.3

Source: USCIS Report, “Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year” (Apr. 30, 2022); <https://egov.uscis.gov/processing-times/historic-pt> (accessed May 24, 2022).

It is important to note that the numbers above reflect the *median* processing times for these EADs. Therefore, processing times for half of these EADs exceed the number of months listed.

**Figure 2.3**

Processing Times for EADs Based on Pending Adjustment Application (in months)

Adjudicating Office	Median	93rd Percentile
California Service Center	20	21.5
Nebraska Service Center	12	14.5
National Benefits Center	7.5	12

Source: USCIS Web page, “Check Case Processing Times;” <https://egov.uscis.gov/processing-times> (accessed Apr. 22, 2022).

**Figure 2.4**

Processing Times for EADs Based on a Pending Asylum Application (in months)

Adjudicating Office	Median	93rd Percentile
Potomac Service Center	10	12
Nebraska Service Center	6.5	9
Texas Service Center	Not reported	

Source: USCIS Web page, “Check Case Processing Times;” <https://egov.uscis.gov/processing-times> (accessed Apr. 22, 2022). (The Texas Service Center omitted these processing times from the display, citing ongoing litigation.)

The USCIS website does not indicate the volume handled at each adjudicating office; therefore, the longer processing times may or may not reflect the bulk of applications. Nevertheless, even the lowest numbers above show the median for adjustment and asylum-based EADs is 7.5

and 6.5 months, respectively, with 50 percent of cases taking longer.<sup>72</sup>

*Automatic Extension of EAD Validity Periods.* EADs for pending adjustment and asylum applications are eligible for an automatic extension if the applicant files an application to renew an EAD on time.<sup>73</sup> As originally implemented, automatic extension allows for validity of the EAD to be extended for 180 days beyond its expiration date or until the date USCIS adjudicates the renewal application, whichever is earlier.<sup>74</sup> USCIS implemented the automatic extension regulation “to help prevent gaps in employment authorization” as it sought to remove the then-existing regulatory requirement to adjudicate most EAD applications within 90 days.<sup>75</sup> These changes were intended, in part, “to provide additional stability and certainty to employment-authorized individuals and their U.S. employers” while providing enough time for adjudicators to process tamper-free EADs and ensure benefit integrity.<sup>76</sup>

Unfortunately, given the lengthy processing times, USCIS is not adjudicating renewal EADs fast enough. As Figure 2.5 illustrates, in FY 2021, more than one in every five cases resulted in the automatic extension period expiring prior to adjudication.

**Figure 2.5**  
FY 2021 Percentage of Automatic Extension Periods Expiring Before Adjudication of EAD<sup>77</sup>

Type	Number filed eligible for automatic extension	Percentage where auto-extension expired
Pending Form I-589 (asylum)	324,904	22%
Pending Form I-485 (adjustment)	136,825	21%

Other EAD categories eligible for automatic extension have experienced similar lapses. These include Violence Against Women Act (VAWA) self-petitioners, who are victims of battery and extreme cruelty by certain family members.<sup>78</sup> While they file fewer overall EAD applications,<sup>79</sup> the automatic extension period for VAWA self-petitioners expired at a rate of 17 percent in FY 2021.<sup>80</sup> Similarly, those granted Temporary Protected Status (TPS), or who are prima facie eligible for it,<sup>81</sup> lapsed at a rate of 14 percent.<sup>82</sup>

With similar or longer EAD processing times currently existing in FY 2022, the automatic extension regulation has proven insufficient to prevent these lapses in employment authorization. To remedy this issue, USCIS implemented a Temporary Final Rule (TFR), effective from May 4, 2022 to October 26, 2023, increasing the maximum EAD extension period from 180 days to 540 days.<sup>83</sup> This is an important, though temporary, step taken by USCIS to mitigate against the gaps in employment authorization that are affecting U.S. businesses and their noncitizen employees. As USCIS stated in its news release announcing the TFR, this additional time will allow the agency an opportunity to address staffing shortages, implement additional efficiencies, and meet its recently announced goal of achieving a 3-month cycle time for EAD applications by the end of FY 2023.<sup>84</sup>

<sup>72</sup> USCIS no longer displays processing times based on the 50th and 93rd percentiles. In May 2022, the agency shifted to a single display reflecting the length of time it has taken to complete 80 percent of adjudicated cases over the previous six months. USCIS Web page, “Case Processing Times;” <https://egov.uscis.gov/processing-times/more-info> (accessed May 9, 2022). Processing delays remain evident under this new display, with the shortest processing times being 8.5 months for an EAD based on a pending adjustment application (National Benefits Center) and 10 months for an EAD based on a pending asylum application (Nebraska Service Center). USCIS Web page, “Check Case Processing Times;” <https://egov.uscis.gov/processing-times> (accessed May 9, 2022).

<sup>73</sup> With certain exceptions, applicants may file to renew their EADs up to 180 days in advance of an expiring card. USCIS Web page, “Employment Authorization Document” (Feb. 11, 2022); <https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document> (accessed Apr. 26, 2022).

<sup>74</sup> 8 C.F.R. § 274a.13(d).

<sup>75</sup> “Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,” 80 Fed. Reg. 81899, 81904 (Dec. 31, 2015). Under then-existing regulations, if USCIS did not adjudicate the EAD in 90 days, applicants could obtain an “interim” employment authorization document at their local USCIS office to serve as temporary evidence of their employment authorization (for a period of up to 240 days). 8 C.F.R. § 274a.13(d) (2016). The CIS Ombudsman considered whether to recommend reimplementing this provision. However, even if USCIS reimplemented this approach, it is unclear whether the reality of workloads, processing delays, backlogs across numerous other categories, and limited in-person resources might render USCIS unable to administer it without negatively impacting other programs, further exacerbating delays in those areas.

<sup>76</sup> *Id.* at 81927.

<sup>77</sup> Information provided by USCIS (Apr. 6, 2022).

<sup>78</sup> INA § 204(a)(1)(K); 8 U.S.C. § 1154(a)(1)(K).

<sup>79</sup> The total volume ranged between 3,800-6,700 per year for FY 2017–FY 2021. USCIS Report, “Form I-765, Application for Employment Authorization, All Receipts, Approvals, Denials Grouped by Eligibility Category and Filing Type, FY 2003–2021” (Dec. 15, 2021); [https://www.uscis.gov/sites/default/files/document/data/I-765\\_Application\\_for\\_Employment\\_FY03-21.pdf](https://www.uscis.gov/sites/default/files/document/data/I-765_Application_for_Employment_FY03-21.pdf) (accessed Apr. 26, 2022).

<sup>80</sup> Information provided by USCIS (Apr. 6, 2022).

<sup>81</sup> See 8 C.F.R. §§ 244.10(a), (e); 274a.12(a)(12), (c)(19).

<sup>82</sup> Information provided by USCIS (Apr. 6, 2022).

<sup>83</sup> See “Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants,” 87 Fed. Reg. 26614 (May 4, 2022).

<sup>84</sup> *Id.*

*H-4 Spouses.*<sup>85</sup> Certain H-4 nonimmigrant spouses are eligible for an EAD and generally receive EADs for validity periods that end when their underlying H-4 nonimmigrant status ends (as evidenced by Form I-94, *Arrival/Departure Record*).<sup>86</sup> They can file an EAD renewal application up to 180 days before their current EAD expires.<sup>87</sup> In FY 2021, USCIS received 63,000 H-4 EAD applications,<sup>88</sup> with the average processing time for renewals ranging from 208 to 301 days.<sup>89</sup> With these average processing times, H-4 spouses are particularly vulnerable to gaps in employment authorization.

Though not originally included in the automatic extension regulation, a recent settlement agreement resulted in USCIS now allowing certain H-4 spouses, along with E and L dependent spouses,<sup>90</sup> to qualify for the automatic extension if they properly file an application to renew their H-4, E, or L-based EAD before it expires and have an unexpired Form I-94 evidencing their corresponding status as an H-4, E, or L nonimmigrant.<sup>91</sup> The automatic

extension of the EAD lasts up to the expiration of Form I-94 or for 540 days,<sup>92</sup> whichever is earlier.

While this change is welcomed, it has little impact unless nonimmigrants first extend their nonimmigrant status. This is because the automatic extension period is limited to the expiration date on Form I-94, which for H-4s is generally the same date the current EAD expires. Filing a renewal EAD application by itself would not trigger any automatic extension time.

*E and L Spouses.* E and L spouses have similar EAD constraints regarding renewals. However, under the terms of the same settlement agreement, USCIS now recognizes these spouses as authorized to work “incident to status.”<sup>93</sup> This means that simply being in E or L status provides them with authorization to work, and their Form I-94 satisfies the employment authorization portion of Form I-9.<sup>94</sup> This is the first instance in which USCIS has formally recognized these spouses as authorized to work incident to their status, which would seem to eliminate the need for EADs for these individuals and, therefore, reduce USCIS’ workload at least by some percentage.<sup>95</sup>

The settlement did not address, however, their employment authorization when they file an extension of their E or L status on time, but USCIS does not adjudicate the extension by the time their status expires. During this period, they would generally be considered in a period of stay authorized by DHS to remain in the United States, subject to certain conditions, but would technically not be in E or L “status.”<sup>96</sup> Therefore, unless they otherwise apply for an EAD and wait out the long processing time for it, such applicants would seem to need to stop working until the E or L extension is granted. This raises yet another potential gap in employment authorization.

<sup>85</sup> “The spouse and children of an H nonimmigrant, if they are accompanying or following to join such H nonimmigrant in the United States, may be admitted, if otherwise admissible, as H-4 nonimmigrants for the same period of admission or extension as the principal spouse or parent. H-4 nonimmigrant status does not confer eligibility for employment authorization incident to status. An H-4 nonimmigrant spouse of an H-1B nonimmigrant may be eligible for employment authorization only if the H-1B nonimmigrant is the beneficiary of an approved Immigrant Petition for Alien Worker, or successor form, or the H-1B nonimmigrant’s period of stay in H-1B status is authorized in the United States under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106-313, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273 (2002).” 8 C.F.R. § 214.2(h)(9)(iv).

<sup>86</sup> USCIS Web page, “Employment Authorization for Certain H-4 Dependent Spouses” (Nov. 12, 2021); <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/employment-authorization-for-certain-h-4-dependent-spouses> (accessed Apr. 26, 2022).

<sup>87</sup> *Id.*

<sup>88</sup> USCIS Report, “Form I-765, Application for Employment Authorization, All Receipts, Approvals, Denials Grouped by Eligibility Category and Filing Type, FY 2003–2021” (Dec. 15, 2021); [https://www.uscis.gov/sites/default/files/document/data/I-765\\_Application\\_for\\_Employment\\_FY03-21.pdf](https://www.uscis.gov/sites/default/files/document/data/I-765_Application_for_Employment_FY03-21.pdf) (accessed Apr. 26, 2022).

<sup>89</sup> Reported by quarter of the fiscal year. Information provided by USCIS (Apr. 6, 2022).

<sup>90</sup> The E-1 and E-2 nonimmigrant classifications allow nationals of certain treaty countries to be admitted to the United States solely to, respectively, carry on substantial international trade or develop and direct the operations of an enterprise in which the nonimmigrant has invested. The E-3 nonimmigrant classification allows certain nationals of Australia to be admitted to the United States to perform services in a specialty occupation. Spouses and children may accompany or follow to join the principal nonimmigrant. INA § 101(a)(15)(E); 8 U.S.C. § 1101(a)(15)(E). The L classification allows certain employees to be admitted to the United States as intracompany transferees to render services to the same employer in a managerial or executive capacity or in a position that involves specialized knowledge. Spouses and children may accompany or follow to join the principal nonimmigrant. INA § 101(a)(15)(L); 8 U.S.C. § 1101(a)(15)(L). The law provides that USCIS shall authorize spouses of E and L nonimmigrants to engage in employment. INA §§ 214(c)(2)(E) and (e)(2); 8 U.S.C. §§ 1184(c)(2)(E) and (e)(2).

<sup>91</sup> See Settlement Agreement, *Shergill v. Mayorkas*, No. 21-cv-1296-RSM (W.D. Wash. Nov. 15, 2021); see also USCIS Policy Alert, “Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses” (Nov. 12, 2021); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20211112-EmploymentAuthorization.pdf> (accessed Apr. 19, 2022).

<sup>92</sup> As with other automatic extension categories, this period was originally 180 days but was extended to 540 days under the TFR. See “Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants,” 87 Fed. Reg. at 26614.

<sup>93</sup> See Shergill Settlement Agreement at 5; see also 10 USCIS Policy Manual, Pt. B, Ch. 2(A); <https://www.uscis.gov/policy-manual/volume-10-part-b-chapter-2> (accessed Apr. 26, 2022).

<sup>94</sup> 10 USCIS Policy Manual, Pt. B, Ch. 2(A); <https://www.uscis.gov/policy-manual/volume-10-part-b-chapter-2> (accessed Apr. 26, 2022).

<sup>95</sup> In FY 2021, USCIS received 25,300 EAD applications in these categories. USCIS Report, “Form I-765, Application for Employment Authorization, All Receipts, Approvals, Denials Grouped by Eligibility Category and Filing Type FY 2003–2021” (Dec. 15, 2021); [https://www.uscis.gov/sites/default/files/document/data/I-765\\_Application\\_for\\_Employment\\_FY03-21.pdf](https://www.uscis.gov/sites/default/files/document/data/I-765_Application_for_Employment_FY03-21.pdf) (accessed Apr. 26, 2022). E and L spouses retain the option of filing for an EAD if they so choose. See Instructions for Form I-765, *Application for Employment Authorization*; <https://www.uscis.gov/sites/default/files/document/forms/i-765instr.pdf> (accessed May 17, 2022).

<sup>96</sup> See USCIS’ Adjudicator’s Field Manual (AFM) § 40.9.2(b)(2)(G); see also AFM § 40.9.2(b)(3)(D).

## PROGRESS MADE BY USCIS

Aside from its stated goal of reducing processing times and backlogs, USCIS has taken commendable steps to mitigate against the loss of employment authorization due to processing delays. Its approach in this regard is evidenced by changes to USCIS regulations, policy, and operations. These include:

- *Extending the validity periods for certain EADs.*<sup>97</sup>
  - USCIS extended the validity periods for EADs based on a pending adjustment application from 1 to 2 years. USCIS made this change “in the interest of reducing the burden on both the agency and the public, because the current median processing time for certain adjustment of status applications [was] close to or greater than 1 year.”<sup>98</sup> In other words, implementing a longer validity period reduces the need for EAD renewal as USCIS processes the underlying adjustment of status application.
  - USCIS extended both initial and renewal periods from 1 to 2 years for asylees, refugees, noncitizens with withholding of deportation or removal, and VAWA self-petitioners. It also extended work authorization for those granted parole or deferred action up to the end of the period granted.<sup>99</sup> As USCIS noted, issuing EADs that are valid for a longer period will help ease USCIS’ backlogs because applicants will no longer need to renew their EADs as frequently. This change will also help prevent gaps in employment authorization.
- *Online filing for EADs*
  - USCIS has made certain EAD categories available for online filing, noting that “the expansion of

online filing is a priority for USCIS as we make our operations more efficient and effective for the agency and our stakeholders, applicants, petitioners and requestors.”<sup>100</sup>

- *Expediting certain EAD applications*
  - USCIS began expediting EAD renewal applications for certain healthcare and childcare workers whose EADs are expiring within 30 days or have already expired.<sup>101</sup>
- *Extending the auto-extension period for certain EAD categories*
  - As described above, USCIS published a TFR that extended the existing automatic extension period for certain EADs, including those based on pending adjustment and asylum applications, from 180 to 540 days.<sup>102</sup>
- *Suspending biometrics*
  - On May 17, 2021, USCIS temporarily suspended the biometrics requirement for people requesting an extension of stay in, or a change of status to, H-4, L-2, and E nonimmigrant status on Form I-539, *Application to Extend/Change Nonimmigrant Status*.<sup>103</sup> As their EADs depend on an approved Form I-539, this 2-year suspension was explicitly based on delays in obtaining biometrics and their impact on these individuals obtaining or renewing EADs.
- *Expanding premium processing*
  - On March 30, 2022, USCIS issued a final rule implementing the Emergency Stopgap USCIS Stabilization Act.<sup>104</sup> Effective May 31, 2022, the rule codifies premium processing fees and adjudication timeframes for certain benefit requests, including

<sup>97</sup> Some stakeholders have advocated for open-ended EADs that would remain valid, for example, during the entire period that an adjustment of status application is pending. Information provided by stakeholders (Mar. 28, 2022). However, such an initiative would leave the employer uncertain of when such employment authorization is to “expire” and therefore when to reverify the documentation. This leaves them open to potential violations for failing to reverify or for attempting to reverify unnecessarily. See 8 C.F.R. § 274a.2(b)(4)(vii); see also U.S. Dept. of Justice Flyer, “How Employers Can Avoid Discrimination in the Form I-9 and E-Verify Processes,” <https://www.justice.gov/crt/page/file/1132606/download> (accessed May 10, 2022)(Subjecting employees to different or unnecessary document requests, based on the employee’s citizenship status or national origin, could violate the law at INA § 274B(a)(6); 8 U.S.C. § 1324b(a)(6)).

<sup>98</sup> USCIS Policy Alert, “Employment Authorization for Certain Adjustment Applicants” (Jun. 9, 2021); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210609-EmploymentAuthorization.pdf> (accessed Apr. 19, 2022).

<sup>99</sup> USCIS Policy Alert, “Updating General Guidelines on Maximum Validity Periods for Employment Authorization Documents based on Certain Filing Categories” (Feb. 7, 2022); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220207-EmploymentAuthorizationValidity.pdf> (accessed Apr. 19, 2022).

<sup>100</sup> USCIS Press Release, “USCIS Announces Online Filing for DACA Renewal Forms” (Apr. 12, 2022); <https://www.uscis.gov/newsroom/news-releases/uscis-announces-online-filing-for-daca-renewal-forms> (accessed Apr. 18, 2022). See also USCIS News Alert, “All Temporary Protected Status Applicants May Now File Forms I-821 and I-765 Online” (Nov. 29, 2021); <https://www.uscis.gov/newsroom/alerts/all-temporary-protected-status-tps-applicants-may-now-file-forms-i-821-and-i-765-online> (accessed Apr. 18, 2022).

<sup>101</sup> USCIS Web page, “How to Make an Expedite Request” (Mar. 21, 2022); <https://www.uscis.gov/forms/filing-guidance/how-to-make-an-expedite-request> (accessed Apr. 26, 2022).

<sup>102</sup> “Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants,” 87 Fed. Reg. 26614.

<sup>103</sup> USCIS News Alert, “USCIS Temporarily Suspends Biometrics Requirement for Certain Form I-539 Applicants” (May 17, 2021); <https://www.uscis.gov/news/alerts/uscis-temporarily-suspends-biometrics-requirement-for-certain-form-i-539-applicants> (accessed Apr. 19, 2022).

<sup>104</sup> Emergency Stopgap USCIS Stabilization Act § 4102, Pub. L. No. 116-159 (2020).

Form I-539 and EAD applications. Under the rule, if an applicant pays the premium processing fee, USCIS will process the Form I-539 or EAD application request within 30 days.<sup>105</sup> Previously, premium processing was not available for Form I-539 or EADs under USCIS regulations.<sup>106</sup>

- It must be noted that USCIS will need time to operationalize this rule and its schedule for doing so remains unclear. USCIS plans to implement premium processing for certain categories of Form I-539 and EADs in FY 2022. However it

“estimates that it will not be able to expand premium processing to ... additional categories of Form I-539 and [EADs] until FY 2025 because premium processing revenues do not yet exist to cover any potential costs associated with expanding premium processing to these additional categories without adversely affecting the processing times of other immigration benefit requests, as directed by Congress.”<sup>107</sup>

- *Settling litigation to allow for more flexibility in the EAD process.*
  - As described above, USCIS now recognizes E and L dependent spouses as employment authorized incident to their status, eliminating the need for an EAD while in status.<sup>108</sup> In addition, H-4, E, and L-2 dependent spouses qualify for automatic extension of their existing EADs under certain conditions. As described above, this change needs improvement to have a real impact.

The CIS Ombudsman recognizes USCIS’ efforts to help prevent loss of employment authorization due to processing delays. However, given the substantial and harmful

impacts that arise from gaps in employment authorization, more needs to be done to prevent these lapses.

## RECOMMENDATIONS

While USCIS continues to develop and assess how to return to more reasonable processing timelines for both initial and renewal EAD applications, the CIS Ombudsman makes the following specific recommendations:

1. ***Build on existing automatic extension periods to allow for uninterrupted work authorization while waiting for USCIS to adjudicate a renewal EAD application.***

USCIS should consider developing a regulation that permanently implements a longer automatic extension period, beyond 180 days, so that delays in adjudicating EAD applications do not interrupt businesses or lead to job losses. Even if USCIS ultimately meets its stated goal for processing EADs in 3 months by the end of FY 2023, backlogs may occur again in the future, as historically they have done since the agency was created.

The CIS Ombudsman could suggest how long the extension period should be. However, USCIS is better positioned to review historical and predicted filing volumes, the number of adjudicators and work hours available to process EADs, historical completion rates, financial resources available, anticipated policy changes that might increase or decrease workloads, and other factors to propose a more appropriate extension period by regulation, while allowing for public comment on the proposal. In addition, USCIS can evaluate the success of the TFR as it relates to these issues, as well as the progress it makes toward its processing time goals for FY 2023. Once these factors are evaluated, USCIS can then consider proposing a permanent, longer-term automatic extension period.

2. ***Provide better options for nonimmigrant spouses to renew their employment authorization.***

*H-4 nonimmigrant spouses.* Eligible H-4 spouses may apply for an extension of stay on Form I-539 and a renewal EAD at the same time. However, even assuming they file at the earliest possible moment (180 days before their status expires),<sup>109</sup> under current processing times USCIS will not adjudicate their Form I-539 for 10-19 months, well beyond the date their

<sup>105</sup> “Implementation of the Emergency Stopgap USCIS Stabilization Act,” 87 Fed. Reg. 18227, 18231 (Mar 30, 2022). The fee required will be \$1,750 for Form I-539 and \$1,500 for the EAD application.

<sup>106</sup> However, as a matter of practice, USCIS used to expedite Form I-539 for H-4 dependents when it was submitted together, or “bundled,” with a Form I-129, *Petition for a Nonimmigrant Worker*, filed on behalf of the H-1B nonimmigrant and premium processing was requested for Form I-129. USCIS eliminated this courtesy when it implemented a biometrics requirement for those filing Form I-539, which necessitated a different processing track than for Form I-129. USCIS Teleconference, “Revised Form I-539 and New Form I-539A” (Mar. 1, 2019).

<sup>107</sup> “Implementation of the Emergency Stopgap USCIS Stabilization Act,” 87 Fed. Reg. at 18235.

<sup>108</sup> USCIS Policy Alert, “Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses” (Nov. 12, 2021); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20211112-EmploymentAuthorization.pdf> (accessed Apr. 19, 2022).

<sup>109</sup> USCIS might also prioritize premium processing of the H-4 EAD, but because the EAD depends on the extension of H-4 status, delays in granting such status would continue to cause interruptions in employment.

status and EAD will expire.<sup>110</sup> Without an approved H-4 extension of stay, the EAD lapses with no automatic extension, rendering the current automatic extension provision of little practical value.<sup>111</sup>

USCIS could prioritize Forms I-539 by H-4 dependents for premium processing, thus adjudicating the extension of stay more quickly and potentially making this auto-extension period for the EAD a reality. However, USCIS will be phasing in premium processing only as resources and operational realities allow. So, it remains to be seen when H-4 spouses will be added. Even if implemented, it would leave H-4 spouses in the position of having to pay \$1,750 simply to avoid a gap in employment authorization under current lengthy processing times.<sup>112</sup>

To address these gaps, USCIS could develop a regulation that implements an automatic EAD extension period for H-4 spouses such that filing the Form I-539 extension of status application, with a renewal EAD application, triggers the automatic EAD extension beyond the end date of Form I-94. It might be argued that, because the EAD is contingent upon being in valid status, allowing this type of automatic extension might risk allowing individuals to work while being ineligible for the underlying extension of status. However, the automatic extension would be limited to H-4 spouses who have already held such status, and a related EAD, and are simply seeking a

renewal.<sup>113</sup> If USCIS determines they are ineligible during the H-4 extension/EAD renewal process, the automatic extension period could simply terminate.

In addition, this proposal mirrors current regulatory allowances for certain employers who seek to extend the status of nonimmigrant employees on Form I-129, *Petition for a Nonimmigrant Worker*, under certain conditions.<sup>114</sup> Under that provision, filing the Form I-129 extension triggers an automatic extension period of 240 days for employees who were previously eligible and approved. The automatic extension ceases once USCIS adjudicates Form I-129 or after 240 days, whichever is earlier. A similar provision could be implemented for eligible H-4 dependent spouses.

*E and L spouses.* While now recognized as employment authorized incident to status, left unaddressed is their employment authorization when they file an extension of their status on time, but USCIS does not adjudicate it before their status expires.<sup>115</sup> To address this, USCIS might implement a regulatory provision, such as the one described above for H-4 spouses, triggering an automatic extension period while their extension of status application is pending. Again, this would only apply to those previously approved for such status and seeking an extension. Without such a provision, lapses in employment would undoubtedly occur.<sup>116</sup>

<sup>110</sup> This processing time would likely be longer had USCIS not suspended biometrics for H-4 nonimmigrants. As USCIS stated, “the significant volume of pending cases related to Form I-539 are particularly impacting the timeframe for USCIS to adjudicate the related employment authorization applications.” USCIS News Alert, “USCIS Temporarily Suspends Biometrics Requirement for Certain Form I-539 Applicants” (May 17, 2021); <https://www.uscis.gov/news/alerts/uscis-temporarily-suspends-biometrics-requirement-for-certain-form-i-539-applicants> (accessed Apr. 19, 2022). While the CIS Ombudsman defers to USCIS’ risk analysis when evaluating biometrics-captured information against delays in processing, the CIS Ombudsman is unaware of information currently suggesting that USCIS needs to reinstate the biometrics requirement. But, if so, USCIS should continue to explore reusing biometrics to gain as much efficiency as possible in the process. See USCIS News Alert, “USCIS to Continue Processing Applications for Employment Authorization Extension Requests Despite Application Support Center Closures” (Mar. 30, 2020); <https://www.uscis.gov/news/alerts/uscis-to-continue-processing-applications-for-employment-authorization-extension-requests-despite> (accessed Apr. 28, 2022).

<sup>111</sup> Alternatively, if eligible, and if the H-1B spouse has been granted an extension of their status, the H-4 nonimmigrant might travel outside the United States, submit a new visa application at a U.S. Consulate abroad that is under the jurisdiction of the Department of State (if required), and be readmitted to the United States upon inspection by a U.S. Customs and Border Protection officer at a U.S. port-of-entry. In addition to these various, uncertain approvals needed from government components outside of USCIS, travel in the current environment can be difficult and interrupts employment and family life. Therefore, USCIS should implement a solution such that travel for the sole purpose of avoiding a lapse in employment is largely unnecessary.

<sup>112</sup> As biometrics remain suspended for H-4 nonimmigrants filing Form I-539, USCIS might also consider returning to the practice, if feasible, to expedite Form I-539 when it is bundled with a Form I-129 for which premium processing is requested.

<sup>113</sup> In FY21, USCIS denied H-4 EAD renewal applications at a rate of 7.2 percent. Implementing this automatic extension period would allow the 92.8 percent who are eligible to continue working without a lapse. Meanwhile, those who are ultimately ineligible would lose their work authorization once USCIS makes such a determination. USCIS Report, “Form I-765, Application for Employment Authorization, All Receipts, Approvals, Denials Grouped by Eligibility Category and Filing Type, FY 2003–2021” (Dec. 15, 2021); [https://www.uscis.gov/sites/default/files/document/data/I-765\\_Application\\_for\\_Employment\\_FY03-21.pdf](https://www.uscis.gov/sites/default/files/document/data/I-765_Application_for_Employment_FY03-21.pdf) (accessed Apr. 26, 2022).

<sup>114</sup> See 8 C.F.R. § 274a.12(b)(20), which allows nonimmigrant workers to continue working for the same employer once the employer files a Form I-129 petition to extend their status. As long as the Form I-129 remains pending, the person may continue working for up to 240 days after their status expires. This is a valuable flexibility written into the regulations, as it allows for uninterrupted work while USCIS adjudicates the case. As of April 22, 2022, USCIS was adjudicating at least 93 percent of these cases within 240 days. USCIS Web page, “Check Case Processing Times,” <https://egov.uscis.gov/processing-times> (accessed Apr. 22, 2022). Therefore, the CIS Ombudsman is not currently recommending extending this timeframe. However, USCIS is best positioned to evaluate the many factors affecting processing times and to propose a longer timeframe, by regulation, if warranted.

<sup>115</sup> In such cases, the E or L spouse could, conceivably, apply for and obtain a EAD to protect against such a lapse. However, this does not appear to be a practical solution, as it adds to USCIS’ workload, wastes the efficiencies gained in recognizing E and L spouses as employment authorized incident to status, and once again subjects the E or L spouse (and their employers) to potentially long-delays in EAD processing times and uncertain timing of receipt of the EAD needed to cover these gaps in status.

<sup>116</sup> As with H-4 spouses, E and L spouses may avail themselves of travel outside of the United States, renewal of their visa (if required) and readmission to the United States in order to obtain a new period of admission. However, given the difficulty and uncertainty such travel can entail, USCIS should instead implement a solution to make travel solely for this reason largely unnecessary.

**3. Allow applicants to file for renewal EADs earlier and issue renewal EADs with validity periods that begin when the original EAD expires.**

USCIS should allow applicants to submit a renewal EAD application more than 180 days before the EAD expires.<sup>117</sup> Allowing an earlier filing would appear to give USCIS more time to process the case, manage its workload, and prevent an unplanned delay in processing from causing a lapse in employment authorization. USCIS' stated goal is to be able to adjudicate EAD applications within 3 months by the end of FY 2023.<sup>118</sup> In instances where the renewal EAD is adjudicated prior to expiration of the current EAD, USCIS should revise its policy and operational processes to allow for the renewal EAD to begin when the original EAD expires, as opposed to its current practice of beginning validity on the date of adjudication.<sup>119</sup> This would help avoid overlapping EAD validity dates and prevent truncated validity of the renewal EAD.<sup>120</sup>

**4. Continue to expedite EAD renewals for workers in certain occupations in the national interest.**

USCIS has expedited EAD renewal applications for healthcare and childcare workers whose EADs have expired or are expiring. USCIS did so to help reduce the harm that the loss of workers in these occupations might cause. With its current backlog, USCIS should continue to identify and prioritize occupations for expedited processing. For example, the United States is still suffering pandemic-induced delays in the supply chains of goods, yet noncitizen truck drivers often cannot maintain their commercial driver's licenses due

to EAD processing delays.<sup>121</sup> Expediting EADs for workers who directly contribute to rectifying supply chain issues may be an area to explore.

There may be other occupations and categories worthy of review, and USCIS is positioned to partner with DHS components, other governmental agencies, and the public to identify where help is needed.

**5. Continue to explore and augment the use of technology, including online filing and machine learning, to further automate EAD processing.**

USCIS has committed to complete electronic processing capability by FY 2026.<sup>122</sup> The CIS Ombudsman continues to support and recommend digitization efforts, as described elsewhere in this Report and in our 2021 Annual Report, including for EAD applications.<sup>123</sup> This can include: the ability to file online, receive all correspondence and notices from USCIS electronically, and respond online to a request for evidence.<sup>124</sup>

In addition, USCIS has started exploring Robotic Process Automation (RPA) to increase efficiency. As stated by a USCIS RPA program manager, "USCIS is a very data-oriented agency, and we process millions of volumes of applications which takes a long time. RPA has accelerated the completion of these tasks, and this results in better services for our citizens and individuals who apply for citizenship."<sup>125</sup> Certain EAD applications "are amenable to streamlined processing using RPA," and "as USCIS expands its efforts to use technology to streamline [EADs] and other applications, it is "further evaluating RPA to determine appropriate technical solutions."<sup>126</sup> USCIS has already begun using RPA to automate certain elements of EAD processing, such as verifying whether an underlying adjustment of status request remains pending.<sup>127</sup>

The CIS Ombudsman recommends continuing to explore the use of RPA to more efficiently process EAD applications. Presumably, USCIS could expand automated eligibility verification to additional EAD

<sup>117</sup> While this article focuses on renewal EADs and preventing lapses in employment authorization, allowing earlier filings may be beneficial in other contexts. For example, F-1 nonimmigrant students who are seeking post-completion Optional Practical Training (OPT) can apply up to 90 days prior to their program end date and have until 14 months after such date to complete up to 12 months of OPT. 8 C.F.R. §§ 214.2(f)(10)(ii)(A)(3); 214.2(f)(11)(i)(B)(2). USCIS is currently processing OPT EAD requests in a timely manner. However, stakeholders have reported that even where USCIS' processing times are relatively quick, the time it takes for the EAD card to be produced, mailed, and received by the student can run into their allowable training window. Information provided by stakeholders (May 13, 2022). In addition, any future delays in case processing, such as due to backlogs, would unduly restrict these students and the entities seeking to hire them. Therefore, allowing earlier filings may provide needed flexibility for all involved.

<sup>118</sup> USCIS Press Release, "USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders" (Mar. 29, 2022); <https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work> (accessed Apr. 26, 2022).

<sup>119</sup> See 10 USCIS Policy Manual, Pt. A, Ch. 4(C)(1); [www.uscis.gov/policy-manual/volume-10-part-a-chapter-4](http://www.uscis.gov/policy-manual/volume-10-part-a-chapter-4) (accessed Apr. 26, 2022).

<sup>120</sup> For example, if a renewal EAD based on a pending adjustment application is granted for two years beginning on the date of adjudication, and the current EAD's validity period has not yet expired, the actual renewal period would be less than 2 full years.

<sup>121</sup> Information provided by stakeholders (Mar. 9, 2022).

<sup>122</sup> USCIS, "Section 4103 Plan Pursuant to the Emergency Stopgap USCIS Stabilization Act—Fiscal Year 2021 Report to Congress," p. iv (Sep. 7, 2021).

<sup>123</sup> CIS Ombudsman's Annual Report 2021, pp. 52–58.

<sup>124</sup> Information provided by stakeholders (Mar. 16, 2022).

<sup>125</sup> Lisbeth Perez, "RPA Experts: Federal Agencies Using RPA but Public Concerns Remain," *MeriTalk* (Nov. 17, 2021); <https://www.meritalk.com/articles/rpa-experts-federal-agencies-using-rpa-but-public-concerns-remain> (accessed Apr. 27, 2022).

<sup>126</sup> Information provided by USCIS (Apr. 6, 2022).

<sup>127</sup> Information provided by USCIS (Mar. 2, 2022).

categories, and use RPA to prioritize renewal cases where loss of employment authorization is imminent. The CIS Ombudsman also recommends that USCIS engage with external stakeholders to discuss advancements and concerns with respect to RPA, including how to maximize efficiency while ensuring security, protection of privacy, and benefit integrity.

**6. Consider new regulations that provide more flexibility for USCIS and approved workers during periods of backlogs or long processing delays.**

As noted above, certain validity periods for EADs are set by regulation while others are defined as a matter of policy. USCIS should explore policy, operational, and regulatory changes that provide more flexibility for those with previously approved EADs while backlogs are occurring or when new, unanticipated workloads create a need for USCIS to divert resources.

For example, USCIS could explore its authority to proactively adjust validity dates as operations dictate. It might develop a regulation, allowing for public notice and comment, which gives USCIS authority to extend currently valid EADs for a certain period, as needed. USCIS could use this authority in response to existing processing delays or based on an anticipated influx of cases. As recent history shows, from Ukraine to Afghanistan to the lingering and uncertain future impacts of the COVID-19 pandemic, a regulation that allows for dynamic expiration dates would give USCIS the flexibility to minimize the effects of backlogs.

**7. Consider increasing flexibility in the Form I-9 process.**

Employers can gain efficiencies from increased flexibility at the Form I-9 completion stage of the verification and reverification process. In response to the pandemic, DHS allowed employers to remotely verify documents due to an inability to inspect documents in person.<sup>128</sup> Similarly, USCIS allowed for approval notices, typically issued by USCIS before producing an EAD, to serve as evidence of employment authorization for Form I-9.<sup>129</sup>

These allowances demonstrate that flexibility is needed in the face of unforeseen events and crises, and to reflect the modern, post-pandemic workplace, where

remote work and telework are more widely available. USCIS could consider regulatory amendments that would allow employers to accept approval notices, where an EAD is now required, for Form I-9 purposes.

USCIS is already exploring how to use technology to provide immediate, up-to-date information on employment authorization without needing to issue updated physical documentation.<sup>130</sup> For example, USCIS is considering the possibility of EAD approval notices containing a Quick Response (QR)<sup>131</sup> code that links to information that USCIS updates when it approves a renewal EAD.<sup>132</sup> The employer would then be able to obtain the new validity date, via the QR code, in the Form I-9 reverification process. The CIS Ombudsman supports continuing these and other such efforts to increase flexibilities in the employment authorization and verification processes.

If USCIS must issue an EAD-like document,<sup>133</sup> USCIS should consider an electronic format. Efforts are underway to move other similar documents to an app-based platform. For example, with Transportation Security Administration approval, certain companies are piloting how to issue driver's licenses via smart phone apps in several states.<sup>134</sup> USCIS should leverage these advancements by engaging with external stakeholders on ways to maximize efficiencies while mitigating risk.

**8. Consider eliminating the need for a separate EAD application when filing for certain benefits.**

USCIS can reconsider the need to separately apply for an EAD when based on a pending underlying request; for example, USCIS currently requires a separate EAD application for those with a pending application to adjust status. USCIS could explore possible changes to regulations that would allow these applicants to receive employment authorization—whether through issuing an EAD, a notice, or some other verification—once they file Form I-485 and security checks are completed and

<sup>128</sup> Immigration and Customs Enforcement (ICE) Press Release, "DHS Announces Flexibility in Requirements Related to Form I-9 Compliance" (Mar. 31, 2021); <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance> (accessed Apr. 27, 2022).

<sup>129</sup> USCIS News Alert, "Employment Authorization Document (EAD) Delays Due to COVID-19" (Sep. 23, 2020); [www.uscis.gov/i-9-central/covid-19-form-i-9-related-news/temporary-policies-related-to-covid-19](http://www.uscis.gov/i-9-central/covid-19-form-i-9-related-news/temporary-policies-related-to-covid-19) (accessed Apr. 27, 2022).

<sup>130</sup> Information provided by USCIS (Mar. 2, 2022).

<sup>131</sup> QR Code Web page, "Answers to your questions about the QR Code (undated);" <https://www.qrcode.com/en/index.html> (accessed Apr. 27, 2022).

<sup>132</sup> Information provided by USCIS (Mar. 2, 2022).

<sup>133</sup> There will likely be some individuals who would prefer an EAD-like document that satisfies both the identity and employment authorization of Form I-9. This may be especially pertinent to noncitizens in certain protected categories who may not possess other forms of identity documentation. Information provided by stakeholders (Mar. 16, 2022).

<sup>134</sup> Apple Press Release, "Apple Announces First States Signed up to Adopt Driver's Licenses and State ID's in Apple Wallet" (Sep. 1, 2021); <https://www.apple.com/newsroom/2021/09/apple-announces-first-states-to-adopt-drivers-licenses-and-state-ids-in-wallet/> (accessed Apr. 27, 2022).



cleared.<sup>135</sup> These requests comprise nearly 30 percent of the over two million EAD applications filed each year. Allowing for employment authorization shortly after filing would eliminate the long wait for an EAD adjudication based on not much more than whether the applicant has a pending adjustment of status application. If USCIS denies the adjustment of status application, it can also revoke employment authorization, as it does today.<sup>136</sup>

## CONCLUSION

Processing delays have caused lapses in employment authorization for otherwise eligible individuals, causing hardship to workers and interrupting U.S. businesses. While USCIS continues to take steps to mitigate against these lapses and commits to reducing EAD processing times, the CIS Ombudsman asserts that more needs to be done in the current backlog environment and in anticipation of similar issues in the future. The CIS Ombudsman encourages USCIS to consider these ideas as it continues to seek ways to minimize lapses in employment authorization.

<sup>135</sup> EAD applicants must establish that they are substantively eligible under the regulations for the EAD and that a favorable exercise of discretion is warranted. USCIS may review the evidence on record to determine whether to exercise such discretion. See 1 USCIS Policy Manual, Pt. E, Ch. 8(C)(1); <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8> (accessed Apr. 28, 2022). That said, while the CIS Ombudsman does not have such data on hand, it believes denials of EADs based on a pending adjustment of status—as a matter of discretion alone—are extremely rare. In any event, security checks conducted on the adjustment of status application can alert USCIS to possible negative factors for USCIS to evaluate in its discretion.

<sup>136</sup> 8 C.F.R. § 274a.14(b).



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## Increasing Accessibility to Legitimate Travel: **ADVANCE PAROLE**

### RESPONSIBLE DIRECTORATES

External Affairs, Service Center Operations and Field Operations

### INTRODUCTION

Congress created adjustment of status (AOS) under section 245(a) of the Immigration and Nationality Act (INA) to allow noncitizens in the United States to obtain lawful permanent resident status without the inconvenience and expense of traveling to a U.S. consulate overseas to obtain

an immigrant visa.<sup>137</sup> Under 8 C.F.R. § 245.2(a)(4), certain AOS applicants who depart the United States before their application is adjudicated are considered to have abandoned that application, which means U.S. Citizenship and Immigration Services (USCIS) can terminate it. To avoid this denial and preserve their eligibility to adjust status, applicants can obtain an advance parole document (APD, also known as Form I-512 or I-512L) from USCIS before leaving the United States.<sup>138</sup>

Advance parole—which does not come from any specific statute but derives from the general parole authority under section 212(d)(5)(A) of the INA—is permission to request reentry to the United States at a port of entry (POE).<sup>139</sup> Applicants who need advance parole must obtain

<sup>137</sup> See “Adjustment of Status to That of Persons Admitted for Permanent Residence; Advance Parole,” 51 Fed. Reg. 7431 (Mar. 4, 1986); see also 7 USCIS Policy Manual, Pt. A, Ch. 1(A); <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-1> (accessed Mar. 18, 2022).

<sup>138</sup> 8 C.F.R. § 245.2(a)(4)(ii)(B).

<sup>139</sup> 8 C.F.R. § 212.5(f).

this permission before leaving the United States, and are eligible when they:

- Have a Form I-485, *Application to Register Permanent Residence or Adjust Status*, pending with USCIS,
- Are in the United States,
- Seek to travel abroad temporarily for urgent humanitarian reasons or in furtherance of a significant public benefit, which may include a personal or family emergency or bona fide business reasons,<sup>140</sup> and
- Have provided biometrics.<sup>141</sup>

USCIS issues APDs on a case-by-case, discretionary basis. When AOS applicants return to the United States, U.S. Customs and Border Protection (CBP) decides whether to allow them to enter the country on advance parole based on its own discretionary determination. There are some exceptions, namely that AOS applicants who have a valid H, L, K, or V nonimmigrant visa do not need to obtain advance parole before traveling.<sup>142</sup>

Few applicants would need to request advance parole when transitioning to lawful permanent resident status if they expected to receive their green cards within 6 months.<sup>143</sup> However, the wait for a green card can currently extend well beyond a year. As of March 31, 2022, the average processing time for Form I-485 in FY 2022 ranged from

8.7 months (for Cuban Adjustment Act cases) to 23.2 months (asylees).<sup>144</sup>

Exacerbated by the COVID-19 pandemic, the delays in adjudicating green cards have also made it increasingly likely that applicants will need to travel while their Form I-485 is pending. USCIS has seen a one-third increase in advance parole requests,<sup>145</sup> and applicants are finding it more difficult to receive the benefit in a timely manner. This has led to more requests to expedite these applications and to issue advance paroles for emergencies,<sup>146</sup> thus adding to the workloads of both the USCIS Contact Center and the adjudicating offices. For some time now, growing numbers of applicants have also been experiencing challenges in obtaining expedites and appointments for emergency advance parole.

In this article, the CIS Ombudsman makes recommendations for alternatives to the current process for adjudicating and issuing an APD as well as for streamlining the advance parole process for AOS applicants filing under section 245(a) of the INA, the largest single category of applicants for advance parole.<sup>147</sup>

<sup>140</sup> Instructions for Form I-131, *Application for Travel Document*, p. 4; <https://www.uscis.gov/sites/default/files/document/forms/i-131instr.pdf> (accessed Mar. 18, 2022). USCIS has internal guidance governing adjudication of advance parole. Information provided by USCIS (Jan. 10, 2022). USCIS interprets “bona fide business or personal reason” to mean “travel for any reason which is not contrary to law or public policy.” INS Interoffice Memorandum (Puleo Memo), “Advance Parole: Form I-512 Issuance to Applicants for Adjustment of Status under Section 245” (Apr. 20, 1995); AILA Doc. No. 95042880; <https://www.aila.org/infonet/ins-issuance-of-advance-parole> (accessed Mar. 17, 2022).

<sup>141</sup> Instructions for Form I-131, *Application for Travel Document*, p. 9; <https://www.uscis.gov/sites/default/files/document/forms/i-131instr.pdf> (accessed Mar. 18, 2022).

<sup>142</sup> See 8 C.F.R. § 245.2(a)(4)(ii)(B)-(D).

<sup>143</sup> In support of its 2007 proposed fee increase, USCIS indicated the new fee rule would provide the necessary resources to meet its 6-month processing time goal. “Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule,” 72 Fed. Reg. 4888, 4893 (Feb. 1, 2007). USCIS has recommitted to the 6-month processing time goal for the Form I-485 by the end of FY 2023. USCIS News Release, “USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders” (Mar. 29, 2022); <https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work> (accessed Apr. 29, 2022).

<sup>144</sup> USCIS Web page, “Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year” (Mar. 31, 2022); <https://egov.uscis.gov/processing-times/historic-pt> (accessed Apr. 29, 2022). Although the average processing time for all service centers, field offices, and the National Benefits Center is currently up to 23.2 months, the posted processing time range for individual service centers and field offices extends in some cases beyond this average. See, e.g., USCIS Processing Times for Vermont Service Center (processing range as of early May 2022 is 19 to 33 months for T and U visa holders seeking AOS); Texas Service Center (22.5 to 43.5 months for asylees); Brooklyn Field Office (15.5 to 41 months for employment- and family-based AOS); and Houston Field Office (15.5 to 25.5 months for employment- and family-based AOS). USCIS Web page, “Processing Times;” <https://egov.uscis.gov/processing-times/> (accessed May 4, 2022).

<sup>145</sup> Calculation performed by the CIS Ombudsman from information provided by USCIS. “FY 2020 USCIS Statistical Annual Report,” p. 21 (2020); <https://www.uscis.gov/sites/default/files/document/reports/2020-USCIS-Statistical-Annual-Report.pdf> (accessed May 31, 2022) and “Number of Service Wide Forms by Quarter, Form Status, and Processing Time (Fiscal Year 2021, Quarter 4);” [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf) (accessed May 31, 2022).

<sup>146</sup> Individuals who need to travel before receiving their APD may request expedited processing of the Form I-131 at the office adjudicating the form, usually a service center or the NBC, or an emergency APD from a local field office to be able to travel. See USCIS Web page, “Emergency Travel” (Nov. 30, 2020); <https://www.uscis.gov/green-card/green-card-processes-and-procedures/travel-documents/emergency-travel> (accessed Mar. 17, 2022).

<sup>147</sup> Calculation performed by the CIS Ombudsman from information provided by USCIS Web page, “Number of Service Wide Forms by Quarter, Form Status, and Processing Time (Fiscal Year 2021, Quarter 4)” (Form I-131 Advance Parole total receipts); [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf) (accessed Mar. 1, 2022), and information provided by USCIS (Mar. 1, 2022).

## RECOMMENDATIONS

To reduce barriers to travel and to enable USCIS to better manage the process of providing APDs to those who need them most, USCIS should consider:

1. Regulatory changes: The agency can take the following measures to implement an operationally workable advance parole process for AOS applicants in the United States.
  - Amend 8 C.F.R. Part 223 to authorize advance parole as incident to filing Form I-485, so that applicants would not need to submit Form I-131, *Application for Travel Document*, if they have a receipt for a pending Form I-485 under section 245(a) of the INA and have submitted biometrics to USCIS.
  - Amend 8 C.F.R. § 245.2(a)(4)(ii)(B) regarding abandonment of Form I-485 upon departing the United States so that it applies only to applicants who are not under exclusion, deportation, or removal proceedings and who leave without a receipt notice evidencing advance parole.
2. Procedural changes: The agency can take the following measures to streamline the current process.
  - Move high-volume Forms I-131 into a digital environment, allowing USCIS to leverage its technological capabilities to electronically notify the applicant and CBP when it grants advance parole.
  - Extend the validity of the advance parole to individuals with pending Forms I-485 until USCIS renders a decision on the Form I-485 or to coincide with current processing times.
  - Stop considering a pending Form I-131 for advance parole to be abandoned by travel abroad.
  - Improve the emergency advance parole process by creating a specific track at the Contact Center for obtaining needed in-person appointments; fostering well-trained points of contact at the field offices for processing requests; developing a unified system of accountability for tracking the number of requests and outcomes of decisions rendered; and ensuring consistent adjudications among field offices.

## ADVANCE PAROLE IS A PROCEDURAL CONSTRUCT

Section 212(d)(5)(A) of the INA gives DHS discretion to parole a noncitizen into the United States for a temporary period on a case-by-case basis for “urgent humanitarian reasons or significant public benefit.”<sup>148</sup> Parole is permission for individuals (even those without a valid and unexpired travel document, such as a green card or U.S. visa) to travel to and enter the United States for a specific reason. It is not considered an “admission” under immigration law.<sup>149</sup> The determination of whether the noncitizen is admissible—able to enter the United States on a visa or other entry document without the limitation of parole—is not part of the parole determination.<sup>150</sup> USCIS, CBP, and U.S. Immigration and Customs Enforcement (ICE) can grant parole on a discretionary basis.<sup>151</sup> Since CBP is the final arbiter of whether an individual can enter the United States, a grant of parole by USCIS or ICE merely allows the individual to present themselves to CBP for inspection and to ask for permission to enter.<sup>152</sup>

Advance parole is not governed by a specific statute or regulation; it is a procedural device derived from the general parole authority in section 212(d)(5)(A) of the INA. The process for applying for advance parole is governed by the form instructions and USCIS operational guidance.<sup>153</sup>

Individuals who may need to apply for advance parole to be able to reenter the United States or preserve their pending applications include the following eligibility categories:

- Individuals with a pending Form I-485;

<sup>148</sup> INA § 212(d)(5)(A); 8 U.S.C. § 1182(d)(5)(A). The Attorney General has delegated this authority to the Secretary of DHS.

<sup>149</sup> INA §§ 101(a)(13)(B) and 212(d)(5)(A); 8 U.S.C. §§ 1101(a)(13)(B) and 1182(d)(5)(A).

<sup>150</sup> See INA § 212; 8 U.S.C. § 1182.

<sup>151</sup> See 8 C.F.R. § 212.5(a).

<sup>152</sup> See CBP Web page, “Advance Parole” (Jul. 22, 2019); <https://www.cbp.gov/travel/us-citizens/advance-parole> (accessed Mar. 29, 2022).

<sup>153</sup> The title of 8 C.F.R. Part 223—Reentry Permits, Refugee Travel Documents, and Advance Parole Documents—indicates it regulates the processing of APDs, but the only provision related to advance parole is 8 C.F.R. § 223.2(a) that requires applicants for advance parole to submit an application designated by USCIS with the required fee and in accordance with the form instructions. The proposed rule codifying the advance parole process would have amended 8 C.F.R. Part 223 to include more provisions specific to advance parole. However, in the final rule creating the current Part 223, USCIS’ predecessor, the Immigration and Naturalization Service (INS), decided to defer clarifying the regulations on the advance parole process in a separate rulemaking, which has yet to take place. “Changes in Processing Procedures for Certain Applications and Petitions for Immigration Benefits,” 59 Fed. Reg. 1455, 1459 (Jan. 11, 1994).

- Deferred Action for Childhood Arrivals (DACA) recipients;
- Temporary Protected Status (TPS) holders;
- Individuals with a pending asylum application; and
- Individuals with humanitarian parole or a T or U visa.<sup>154</sup>

To request advance parole, applicants must submit a completed Form I-131 and an application fee, if applicable, to USCIS.<sup>155</sup> The Form I-131 includes questions on the purpose of the trip, countries the applicant intends to visit, expected length of the trip, and how many trips the applicant intends to take, among other things. How much weight USCIS gives the applicant's responses when adjudicating Form I-131 depends on the above eligibility categories.<sup>156</sup> AOS applicants can travel for any reason which is not contrary to law or public policy and therefore do not need to provide information about the purpose of the trip, countries to be visited, and length of trip. Generally, the service centers and National Benefits Center (NBC) adjudicate Form I-131 but field offices adjudicate emergency requests for advance parole.

An APD issued by USCIS can be presented by the applicant to CBP upon arriving at a POE. The document can be either a stand-alone APD or combination EAD and travel document (known as a combo card), and its validity period and how often the recipient can reenter depends on the basis for advance parole and the type of travel document issued.<sup>157</sup> An APD issued by a service center or the NBC to an applicant with a pending Form I-485 filed under section 245(a) of the INA has a validity period of no more than 1 year (minus 1 day) from the date of approval and allows for multiple entries. A combo card issued

by the centers has the same validity period as the EAD, which could be up to 2 years, and also allows for multiple reentries.<sup>158</sup> Service centers and the NBC use USCIS systems to generate an APD (Form I-512L) with a laser photo. The field offices, however, generate an emergency APD (Form I-512) by filling out and printing the Form I-512, manually cutting and pasting a photo to it, adding a secure embossed seal, and placing laminate on top.<sup>159</sup> The validity period and allowable number of reentries can vary by field office.<sup>160</sup>

### Advance Parole Provides Needed Access to Legitimate Travel for AOS Applicants

Applicants waiting for USCIS to decide their Form I-485 may need to travel abroad for a range of family, medical, educational, and business reasons. Waiting to receive the green card before traveling has become less likely as Form I-485 processing times have trended up for the last 2 decades, especially in the last 2 years. The current average national processing time for Form I-485 at all service centers, field offices, and the NBC ranges from 8.7 to 23.2 months, or almost 2 years, which is almost 3 times longer than the processing times of 4.6 to 7.9 months in FY 2017.<sup>161</sup> Moreover, current posted processing times for individual field offices show that some offices take up to 41 months, representing applicants waiting an additional 3 years beyond the national average to receive their permanent residence.<sup>162</sup> These unprecedented and severe processing times mean more, if not most, applicants with family and business ties abroad need to travel while waiting for USCIS to adjudicate their applications.

USCIS does not track how many AOS applications it denies as abandoned because the applicants departed the United States without a valid APD.<sup>163</sup> However, the total number of applications denied due to any kind of abandonment is low. The percent of abandonment denials for employment-based Forms I-485 stood at 6 percent (2,274 out of 40,667 Form I-485 denials), and the denials for family-based adjustments stood at only 1 percent

<sup>154</sup> Instructions for Form I-131, *Application for Travel Document*, pp. 4–5; <https://www.uscis.gov/sites/default/files/document/forms/i-131instr.pdf> (accessed Mar. 18, 2022).

<sup>155</sup> 8 C.F.R. § 223.2(a). Since July 30, 2007, USCIS has not been collecting a separate fee for advance parole requests from AOS applicants who pay the Form I-485 filing fee because the fee structure was changed to bundle the fees for Forms I-485, I-765, and I-131. Although AOS applicants paid one filing fee that covered all three forms and ancillary interim benefit renewals, they could choose not to request either or both of the interim benefits. See “Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule,” 72 Fed. Reg. 29851 (May 30, 2007).

<sup>156</sup> Information provided by USCIS (Jan. 10, 2022). The eligibility requirements and effect of departure from the United States for other advance parole applicants differ. For example, DACA recipients applying for advance parole must show the proposed travel is in furtherance of humanitarian, educational, or employment purposes; asylees and refugees applying for AOS are not considered to have abandoned their applications upon departure from the United States; and asylees and refugees can apply for a Refugee Travel Document, which has different standards from advance parole.

<sup>157</sup> Information provided by USCIS (Jan. 10, 2022 and Apr. 20, 2022). USCIS is moving away from issuing combo cards and will instead issue separate employment and travel authorization documents as part of its efforts to reduce its backlog and case processing times for the Form I-765. USCIS Web page, “I-765, Application for Employment Authorization” (Mar. 23, 2022); <https://www.uscis.gov/i-765> (accessed Mar. 30, 2022).

<sup>158</sup> Information provided by USCIS (Jan. 10, 2022).

<sup>159</sup> Information provided by USCIS (Apr. 20 and 25, 2022).

<sup>160</sup> Information provided by USCIS (Apr. 25, 2022).

<sup>161</sup> USCIS Web page, “Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year” (Mar. 31, 2022); <https://egov.uscis.gov/processing-times/historic-pt> (accessed May 2, 2022).

<sup>162</sup> USCIS Web page, “Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year” (Feb. 28, 2022); <https://egov.uscis.gov/processing-times/historic-pt> (accessed Mar. 19, 2022).

<sup>163</sup> Information provided by USCIS (Jan. 10, 2022). Other reasons for abandoning a Form I-485 include not responding to a request for evidence or not appearing for a scheduled biometrics collection or interview.

(12,469 out of 191,214 Form I-485 denials) from FY 2017 to FY 2021.<sup>164</sup>

Having an APD can also prevent gaps in travel authorization for applicants who experience a change in their nonimmigrant status or visa while waiting for USCIS to adjudicate their Form I-485. Individuals who are not required to have an advance parole to travel, particularly H and L visa holders, still apply for advance parole as a strategy to avoid gaps in travel authorization.<sup>165</sup> However, if these applicants depart the United States before USCIS grants their request for an initial APD, USCIS will consider Form I-131 abandoned upon departure and deny it. Since the filing fee for Form I-485 covers advance parole and advance parole renewals, prudent applicants apply for advance parole even if they have no plans to travel. Under the current fee structure, there is little disincentive to file again since they typically do not have to pay another fee.

Applying for advance parole is accordingly common for AOS applicants, and as a result, this group makes up the largest single category of applicants for advance parole. In FY 2021, USCIS received 595,977 Forms I-131 requesting advance parole, an increase from previous years of more than 33 percent.<sup>166</sup> Of that total, almost 92 percent (545,588) were filed by AOS applicants.<sup>167</sup>

Unless waived, AOS applicants are interviewed at a field office. USCIS can waive the interview and it is up to the discretion of the adjudicating officer to grant waivers on a case-by-case basis.<sup>168</sup> However, USCIS closed its offices and canceled all interviews and biometrics appointments between mid-March and June 2020 in response to the COVID-19 pandemic. These cancellations, coupled with prioritizing certain naturalization cases when in-person services resumed, limited USCIS' ability to pre-process Form I-485 and to conduct interviews that were not waived.<sup>169</sup> This meant fewer interviews took place,

and USCIS completed a record low number of Forms I-485. In FY 2020, USCIS completed a total of 504,200 applications—the fewest total completions in the last 5 years.<sup>170</sup> Since then, USCIS has taken measures to complete more cases, such as expanding interview waiver criteria and reallocating caseloads to leverage available resources in other sectors, resulting in an increase in AOS completions in FY 2021.<sup>171</sup>

### Travelers Beware: Severe Consequences Can Result From Departing the United States, Even With an APD

USCIS does not decide whether an individual can or cannot travel, but it does warn of the possible consequences on eligibility for future immigration benefits if an individual departs the United States. The Form I-131 instructions warn applicants applying for an initial APD that their Form I-131 will be considered abandoned if they leave the United States before USCIS has issued the APD and that USCIS can revoke or terminate the APD while they are outside of the United States.<sup>172</sup>

**Figure 3.1**  
Form I-131 Travel Warning

**d. If you depart from the United States before the Advance Parole Document is issued, your application for an Advance Parole Document will be considered abandoned.**

Source: Instructions for Form I-131, *Application for Travel Document*, p. 6.

Typically, noncitizens who present an APD to a CBP officer at a POE will be held for additional questioning for what some stakeholders have referred to as a “soft”

<sup>164</sup> *Id.*

<sup>165</sup> Information provided by stakeholders (Feb. 14 and 15, 2022 and Mar. 9, 2022).

<sup>166</sup> USCIS Web page, “Number of Service Wide Forms by Quarter, Form Status, and Processing Time” (Fiscal Year 2021, Quarter 4) (Form I-131 Advance Parole total receipts); [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf) (accessed Mar. 1, 2022).

<sup>167</sup> Calculation performed by the CIS Ombudsman from the following sources: USCIS Web page, “Number of Service Wide Forms by Quarter, Form Status, and Processing Time” (Fiscal Year 2021, Quarter 4) (Form I-131 Advance Parole total receipts); [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf) (accessed Mar. 1, 2022) and information provided by USCIS (Mar. 3, 2022).

<sup>168</sup> 7 USCIS Policy Manual, Pt. A, Ch. 5(A); <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-5> (accessed Mar. 18, 2022). See also USCIS Policy Alert, “Refugee and Asylee Adjustment of Status Interview Criteria and Guidelines” (Sep. 16, 2021); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210916-RefugeeAsyleeAOSInterviewCriteria.pdf> (accessed Mar. 21, 2022).

<sup>169</sup> CIS Ombudsman’s Annual Report 2021, p. 8.

<sup>170</sup> “FY 2020 USCIS Statistical Annual Report,” p. 5 (2020); <https://www.uscis.gov/sites/default/files/document/reports/2020-USCIS-Statistical-Annual-Report.pdf> (accessed May 31, 2022).

<sup>171</sup> See USCIS Web page, “Number of Service Wide Forms by Quarter, Form Status, and Processing Time” (Fiscal Year 2021, Quarter 4) (Dec. 15, 2021); [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf) (accessed May 29, 2022).

<sup>172</sup> See generally Instructions to Form I-131, *Application for Travel Document*; <https://www.uscis.gov/sites/default/files/document/forms/i-131instr.pdf> (accessed Mar. 18, 2022).

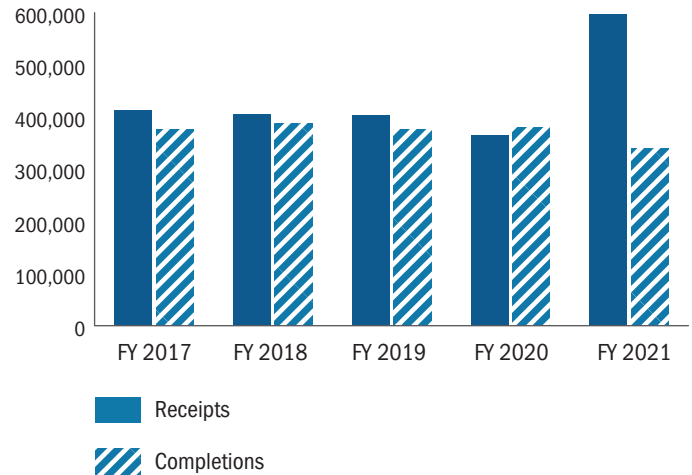
secondary inspection.<sup>173</sup> CBP has the discretion to deny entry even if the noncitizen presents an APD and can instead place the noncitizen in removal proceedings under section 240 of the INA, where an immigration judge (IJ) would determine their admissibility as an “arriving alien” (also referred to as an applicant for admission).<sup>174</sup> CBP may also give the noncitizen with an APD the option to withdraw their application for admission at the POE.<sup>175</sup>

### Delays in Advance Parole Adjudication Contribute to Overall Backlogs and Impede Legitimate Travel

*Significant Form I-131 (advance parole) backlogs have grown across USCIS.* As the fifth most frequently filed form in Fiscal Year (FY) 2021, advance parole requests tax USCIS’ currently overstretched resources. This is illustrated by the filings in the last quarter of 2020, which continue to impact USCIS systems even in 2022. A substantial forward movement in priority dates for immigrant visas on October 1, 2020, especially employment-based immigrant visas, meant thousands of applicants became eligible to file for AOS, along with advance parole and employment authorization. USCIS was inundated with filings at its lockboxes in the first quarter of FY 2021, especially in late October and early November. USCIS was unable to handle this substantial increase in volume at the lockboxes due to decreases in the workforce caused by the COVID-19 pandemic and measures taken in response to the agency’s fiscal challenges which led to a frontlog—delay in receipting forms within the normal receipt issuance period—of hundreds of thousands of applications and petitions that USCIS could not log and forward for adjudication until several months later.<sup>176</sup> The average processing time for Form I-131 therefore became

even longer for applicants who filed in the fall of 2020.<sup>177</sup> USCIS has taken well over a year to provide applicants with what was supposed to be an interim benefit while they wait to receive their green cards.

**Figure 3.2**  
Advance Parole Receipts and Completions



Sources: USCIS FY 2016–2020 Statistical Annual Report, p. 21 (2020) (for Fys 2017 to FY 2020) and USCIS Web page, “Number of Service Wide Forms by Quarter, Form Status, and Processing Time” (Fiscal Year 2021, Quarter 4).

Notwithstanding recent worldwide travel limitations, USCIS has seen a substantial increase in requests for APDs during the past 5 years. *See* Figure 3.2, *Advance Parole Receipts and Completions*. USCIS received 416,417 Forms I-131 for advance parole in FY 2017 and a record high 595,977 in FY 2021. In this same period, USCIS completed fewer Forms I-131 than it received. By the end of FY 2021, 364,644 Forms I-131 were still waiting for decisions.<sup>178</sup> Completions slightly outpaced receipts in FY 2020, but USCIS also received fewer Forms I-131 that year. In addition, the processing times for Form I-131 advance parole increased from under 2 months in FY 2006 to 7.7 months in FY 2021.<sup>179</sup>

<sup>173</sup> CBP inspects everyone arriving at a port of entry to the United States by asking them questions during primary or secondary inspections to determine their compliance with immigration, customs, and agricultural regulations. CBP Web page, “Know Before You Visit” (May 23, 2022); <https://www.cbp.gov/travel/international-visitors/know-before-you-visit> (accessed May 31, 2022) and CBP Web page, “Frequently stopped for questioning and inspection when clearing Customs and Border Protection” (Aug. 9, 2021); [https://help.cbp.gov/s/article/Article-11?language=en\\_US](https://help.cbp.gov/s/article/Article-11?language=en_US) (accessed May 31, 2022). Primary inspection is the initial inspection at an airport or seaport and secondary inspection occurs when the person is referred for additional questioning. “Soft” secondary refers to CBP asking additional questions, but the expected outcome is the release of the traveler. American Immigration Council, “CBP Restrictions on Access to Counsel,” p. 2, fn. 6; [https://www.americanimmigrationcouncil.org/sites/default/files/foia\\_documents/access\\_to\\_counsel\\_cbp\\_foia\\_factsheet.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_cbp_foia_factsheet.pdf) (accessed May 31, 2022).

<sup>174</sup> 8 C.F.R. § 1.2. Applicants for admission can seek AOS in removal proceedings if the applicant is attempting to return to the United States on advance parole, USCIS denied the applicant’s Form I-485 filed before or concurrently with the Form I-131, and the applicant is renewing the previously filed Form I-485. See 8 C.F.R. § 1245.2(a)(1)(ii).

<sup>175</sup> See § 235(a)(4) of the INA; 8 U.S.C. § 1225(a)(4); see also 8 C.F.R. § 235.4.

<sup>176</sup> CIS Ombudsman’s Annual Report 2021, p. 11.

<sup>177</sup> Stakeholders provided examples of Forms I-131 filed at that time requesting initial APDs for section 245 AOS cases that were not adjudicated until the early months of 2022. Information provided by stakeholders (Feb. 14 and Mar. 9, 2022).

<sup>178</sup> USCIS Web page, “Number of Service Wide Forms by Quarter, Form Status, and Processing Time” (Fiscal Year 2021, Quarter 4); [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf) (accessed May 31, 2022).

<sup>179</sup> Compare “Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule,” 72 Fed. Reg. 4888, 4893 (Feb. 1, 2007) with USCIS Web page, “Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year, Fiscal Year 2017 to 2022” (Feb. 28, 2022); <https://egov.uscis.gov/processing-times/historic-pt> (accessed Mar. 23, 2022).



USCIS grants an overwhelming majority of Form I-131 advance parole requests. Between FYs 2017 and 2021, the grant rate for such has ranged from 78 to 93 percent.<sup>180</sup>

## IS AN APD EVEN NECESSARY?

USCIS may wish to reexamine whether it needs a separate advance parole adjudication process or a separate advance parole card or document at all. USCIS grants advance parole to AOS applicants based on their pending Form I-485. By applying the employment authorization incident to status structure to advance parole authorization for applicants filing under section 245(a), USCIS could bypass the adjudicative process altogether.<sup>181</sup>

If USCIS bypasses the adjudicative process, these applicants would not be required to submit Form I-131 and wait for USCIS to separately adjudicate and issue an APD. There is no current regulatory requirement that USCIS issue a document as proof of advance parole.<sup>182</sup> A receipt notice may not provide the feeling of security that an APD provides, but it would be tied to the applicant's identity (such as a passport) and confirmed in USCIS databases, to which CBP has access. USCIS could also augment the receipts with new technologies to make it verifiable (via a QR code or other tool). To make sure applicants are informed of the risks of traveling overseas with or without advance parole, USCIS could incorporate the travel warnings provided on the Form I-131 instructions into the Form I-485 instructions, the receipt notice, and other documentation provided to the applicant.

*Backlogs have led to more expedite and emergency requests for advance parole.* If applicants need to travel before USCIS adjudicates their case, they can request expedited processing—USCIS adjudicates their application currently pending at a service center or the NBC ahead of others filed at the same time or earlier—or an emergency APD at a field office via a separate application. Overall, Form I-131 expedited processing requests have almost

doubled from 10,743 in FY 2017 to 20,081 in FY 2021.<sup>183</sup> Similarly, in-person appointments scheduled to address Form I-131 emergency advance parole requests have trended up from a low of 9,933 in FY 2019 to a high of 15,155 in FY 2021.<sup>184</sup> While still relatively quick, wait times for in-person appointments at a field office have also increased from 1.56 days in FY 2019 to 2.81 days in FY 2021.<sup>185</sup>

The expedite and emergency advance parole processes create challenges for applicants and for the agency by involving additional components and requirements and less efficient procedures. The Form I-131 instructions do not include information on how to request expedited processing for AOS applicants in the United States. Without other guidance, USCIS' general expedite criteria fills the void. To qualify for expedited processing, the applicant must meet at least one of the following criteria or circumstances:

1. Severe financial loss to a company or person, provided that the need for urgent action is not a result of the petitioner's or applicant's failure to timely file the benefit request or respond to any requests for additional evidence;
2. Emergencies and urgent humanitarian reasons;
3. Nonprofit organizations whose request is in furtherance of U.S. cultural or social interests;
4. U.S. government interests; or
5. Clear USCIS error.<sup>186</sup>

To qualify for an emergency APD, applicants must be experiencing an emergent travel need—meaning “arising unexpectedly.”<sup>187</sup> In either case, they must reach out to the USCIS Contact Center to request expedited processing for the pending request or to schedule an appointment at a field office to submit the emergency APD request.<sup>188</sup> The Contact Center reaches out to field offices to schedule an urgent appointment within 2 days, but applicants have complained of waiting days, sometimes weeks, before receiving a call back from the Contact Center. By the

<sup>180</sup> The grant rate includes all eligibility categories, but it is reasonable to assume the grant rate for the AOS applicant category would be in the high range, if not above, given this category represents a significant majority of Form I-131 advance parole requests and has minimal eligibility requirements. Calculation based on data available from USCIS Web page, “Number of Service wide Forms by Quarter, Form Status, and Processing Time” (Fiscal Year 2021, Quarter 4); [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf) (accessed May 31, 2022).

<sup>181</sup> Certain noncitizens are authorized to work because of their immigration status; they do not need permission to work from USCIS or an EAD as proof of work authorization but in some cases can obtain one from USCIS by filing a Form I-765 if they desire the documentation. See, e.g., 8 C.F.R. § 274a.12(a)(5).

<sup>182</sup> In fact, until 2007, adjustment applicants who held H or L nonimmigrant visas had to present the original Form I-485 receipt notice to CBP upon return to the country. “Removal of Receipt Requirement for Certain H and L Adjustment Applicants Returning From a Trip Outside the United States,” 72 Fed. Reg. 61791 (Nov. 1, 2007).

<sup>183</sup> Information provided by USCIS (Jan. 10, 2022).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> USCIS Web page, “How to Make an Expedite Request” (Jan. 25, 2022); <https://www.uscis.gov/forms/filing-guidance/how-to-make-an-expedite-request> (accessed Mar. 15, 2022) and 1 USCIS Policy Manual, Pt. A, Ch. 5; <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-5> (accessed May 31, 2022).

<sup>187</sup> USCIS Web page, “Emergency Travel” (Nov. 30, 2020); <https://www.uscis.gov/green-card/green-card-processes-and-procedures/travel-documents/emergency-travel> (accessed Mar. 17, 2022).

<sup>188</sup> *Id.*

time an applicant receives an appointment at a field office, the desire to travel may still be there, but USCIS may no longer consider the situation urgent due to the passage of time.

*Individuals experience challenges seeking emergency APDs.* In FY 2021, the CIS Ombudsman received 568 requests for case assistance related to advance parole requests, regarding noncitizens missing or delaying medical procedures, looking after sick relatives, paying their last respects, seeking to engage in business opportunities, and participating in other life events while waiting months for their APDs. COVID-19 pandemic measures, contract cuts, and other measures taken by USCIS in response to its financial challenges have meant many customer service functions have been more difficult to access.<sup>189</sup> Applicants seeking expedited processing or emergency advance parole appointments are often unable to get through to someone who can assist them at Tier I, or they do get through only to be told their circumstances do not qualify as an emergency.

*Individuals and officers face challenges successfully completing the emergency advance parole process.* USCIS estimates it can take up to 2 hours to complete a request for emergency advance parole at a field office, which includes receiving Form I-131, supporting documents, and filing fee (if applicable), resolving any issues with biometrics, and reviewing information in various USCIS systems and the form and documents submitted in support of the request, and creating the APD.<sup>190</sup> This last step—which requires transitioning between USCIS electronic systems, accessing secure areas, printing the APD, cutting and pasting the applicant’s photo to the document, and finally laminating it—is usually the most time-consuming step in the emergency advance parole process.<sup>191</sup> Due to the amount of time needed, USCIS does not schedule appointments for emergency advance parole after mid-afternoon to give the office time to complete the necessary steps. The nature of an emergency advance parole is that time is of the essence and the process can add another burden on an already stressful environment for the applicant and USCIS staff. Emergency advance parole requests are an additional strain to the already short-staffed USCIS Contact Center and field offices because they both consume and divert critical resources that impact customer services and adjudications.

<sup>189</sup> See “Expedites,” *infra*. See also CIS Ombudsman’s Annual Report 2021, p. 11.

<sup>190</sup> Information provided by USCIS (Jan. 10, 2022 and Apr. 25, 2022); see also USCIS Web page, “Emergency Travel” (Nov. 30, 2020); <https://www.uscis.gov/green-card/green-card-processes-and-procedures/travel-documents/emergency-travel> (accessed Mar. 15, 2022).

<sup>191</sup> Information provided by USCIS (Apr. 25, 2022).

The CIS Ombudsman has received requests for assistance from individuals because they are having difficulty showing their travel needs are urgent. Applicants must bring medical documentation or a death certificate as evidence to support the emergency advance parole request.<sup>192</sup> This suggests that travel to obtain medical treatment, attend funeral services, or visit an ailing relative would meet the definition of an extremely urgent situation. However, some applicants have sought the CIS Ombudsman’s assistance because they could not obtain an in-person appointment or expedited processing of their Form I-131 to travel for these reasons.

*I recently submitted an expedite request for processing of a [F]orm I-131 (advance parole document . . . originally submitted July 6th, 2021). The expedite request is based on an emergency humanitarian criterium {sic}; my father had passed away on October 22nd, 2021 . . . . My understanding is that the expedite request is in place to react quickly to important life events or emergencies. However, it has been over a month since I submitted my first “expedite” request, and after calling USCIS multiple times I’ve only now managed to secure [a]n on-site meeting with a USCIS officer on December 27th (over two months after my father’s death!). To add insult to injury, during the most recent phone conversation I had with the USCIS contact center, the officer I spoke with told me that my case no longer constitutes an emergency, since it has been several weeks since my father’s passing away. . . . This process has been highly frustrating.*<sup>193</sup>

The CIS Ombudsman has seen more than one instance of applicants’ requests for expedited processing and emergency APD to attend a relative’s funeral service being denied. Moreover, there are other milestones (personal or professional) that are not necessarily a matter of life or death but for which applicants want to be present outside the country. USCIS does not deem most of these cases urgent enough to warrant an expedite or an emergency APD.<sup>194</sup>

*Individuals are filing additional Forms I-131 to preserve their AOS applications.* When obtaining an emergency APD at a field office, individuals could end up with an APD that has less favorable terms than what they would receive for a Form I-131 advance parole request processed regularly at a service center or the NBC. The validity

<sup>192</sup> USCIS Web page, “Emergency Travel” (Nov. 30, 2020); <https://www.uscis.gov/green-card/green-card-processes-and-procedures/travel-documents/emergency-travel> (accessed Mar. 29, 2022).

<sup>193</sup> Information provided by stakeholder in request for case assistance.

<sup>194</sup> Information provided by stakeholders (Feb. 14, 2022).

period and number of authorized entries issued for an emergency APD vary by field office, but a field office issuing an APD valid for 30 days and a single entry is not unheard of. Because USCIS will deny Form I-131 as abandoned upon the applicant's departure from the United States, applicants who travel overseas under their nonimmigrant visa and are requesting emergency advance parole to preserve their Form I-485 would have to file Form I-131 again with the service center or NBC. In contrast, departing the United States before USCIS decides on an application for a reentry permit or refugee travel document, both travel documents regulated by 8 C.F.R. Part 223, does not deem the application abandoned.<sup>195</sup>

## REIMAGINING THE ADVANCE PAROLE PROCESS

USCIS has long used advance parole to permit applicants with a pending Form I-485 to travel overseas and return to the United States without abandoning their application, but the adjudication process is antiquated. In view of the concerns noted, the CIS Ombudsman recommends that USCIS reimagine the advance parole process. The following recommendations focus on AOS applicants.

Specifically, the CIS Ombudsman recommends the following.

### 1. *Regulatory changes: The agency can take the following measures to implement an operationally workable advance parole process for AOS applicants in the United States.*

- Amend 8 C.F.R. Part 223 to authorize advance parole as incident to filing Form I-485, so that applicants would not need to submit Form I-131, Application for Travel Document, if they have a receipt for a pending Form I-485 under section 245(a) of the INA and have submitted biometrics to USCIS. Instead of having an officer adjudicate Form I-131, AOS applicants could certify that the purpose of any travel abroad will be temporary and for bona fide reasons. They could provide this certification when they file the Form I-485 or at the biometric appointment.
- Amend 8 C.F.R. § 245.2(a)(4)(ii)(B) regarding abandonment of Form I-485 upon departing the United States so that it applies only to applicants who are not under exclusion, deportation, or removal proceedings and who leave without a receipt notice evidencing advance parole. The

rapid pace of globalization since the late 1960s, when 8 C.F.R. § 245.2 was amended to address departures prior to the adjudication of an AOS application, has contributed to increased mobility of goods, services, and people across borders. Air transportation policies have adapted by creating safer, more frequent, and less expensive flights, so considering applicants to have abandoned their Form I-485 because they left the United States is excessive and creates workload issues for USCIS. Having a bright-line definition of when USCIS can deny an application is efficient, but that efficiency may be generating unnecessary filings.

### 2. *Procedural changes: The agency can take the following measures to streamline the current process.*

- Move high-volume Forms I-131 into a digital environment, allowing USCIS to leverage its technological capabilities to electronically notify the applicant and CBP when it grants advance parole. USCIS enters Form I-131 into Electronic Immigration System (ELIS) for processing, but only the National Benefits Center (NBC) produces the APD through ELIS.<sup>196</sup> The service centers and field offices continue to use USCIS' antiquated CLAIMS 3 system when adjudicating and producing APDs. Moreover, USCIS has made no outward progress to digitizing the form, as online filing is not available.

The implementation of online processing and filings of other high-volume forms demonstrates the benefit of moving these filings into the digital environment. USCIS is transitioning to a one-stop process in ELIS for advance parole but has not committed to a specific timeframe.<sup>197</sup> USCIS can work with CBP to enhance communications between the two agencies' systems to allow CBP to verify electronically that the individual at the POE has a pending Form I-485 and is thus eligible for advance parole. USCIS could collaborate with CBP to develop a technological solution that would provide proof of advance parole approval electronically via USCIS' or CBP's database or website. In other contexts, CBP has previously indicated that it would explore the possibility of adding USCIS approval information to its website.<sup>198</sup> The CIS Ombudsman encourages USCIS to prioritize moving Form I-131 into a digital environment, thereby reducing the likelihood of a frontlog and allowing USCIS to leverage its

<sup>196</sup> Information provided by USCIS (Apr. 20, 2022).

<sup>197</sup> Information provided by USCIS (Apr. 25, 2022).

<sup>198</sup> See CBP Web page, "I-94 Website;" <https://i94.cbp.dhs.gov/i94/#/home> (accessed Aug. 10, 2021).

<sup>195</sup> 8 C.F.R. § 223.2(d).

technological capabilities to electronically notify the applicant and CBP when it grants advance parole. Service centers and field offices would also be able to benefit from being able to use ELIS to create an APD for individuals who still desire one.

- *Extend the validity of the advance parole to individuals with pending Form I-485 until USCIS renders a decision on the Form I-485 or to coincide with current processing times.* The validity period and number of trips allowed depends on the basis for the advance parole and each field office's practice. For AOS applicants, USCIS policy since 1995 has been to issue an APD for multiple entries "valid for a period which coincides with the time normally required for completion of an AOS application not to exceed one year." However, with processing times close to two years or more, the current validity period is not sufficient. Increasing the maximum validity period provided on APDs for this category will help ease processing backlogs by reducing the number of times these applicants must renew their APDs. At the same time, it will help prevent gaps in travel documentation, relieving the frustration of applicants who are unable to travel for months.
- *Stop considering a pending Form I-131 for advance parole to be abandoned by travel abroad.* If an applicant leaves the United States with an emergency APD that is valid for the entire time they will be abroad, USCIS will not view the applicant as having abandoned their pending Form I-131.<sup>199</sup> However, stakeholders have raised with the CIS Ombudsman their concern that USCIS is denying applications to receive an initial APD when applicants have departed the United States on a valid nonimmigrant visa

before receiving their initial APD.<sup>200</sup> Form I-485 applicants are essentially unable to exercise this right due to delays at USCIS with the Form I-131. The purpose of advance parole is to permit the entry of individuals without valid travel documents and protect the pending Form I-485 from being deemed abandoned. Denying the applications of individuals traveling with valid nonimmigrant visas fails to further this purpose nor does it make operational sense, given that they will likely file again.

- *Improve the emergency advance parole process by creating a specific track at the Contact Center for obtaining needed in-person appointments; fostering well-trained points of contact at the field offices for processing requests; developing a unified system of accountability for tracking the number of requests and outcomes of decisions rendered; and ensuring consistent adjudications among field offices.* USCIS does not systematically record the number of emergency requests for Forms I-131 advance parole its field offices approve and deny.<sup>201</sup> USCIS should consistently track the number of requests received by the Contact Center and field offices for emergency advance parole, the outcome of the adjudications, and reasons for approval or denial. This analysis could inform training, facilitate the development of clear guidance, and result in greater consistency in the exercise of discretion.

<sup>199</sup> CIS Ombudsman Blog, "Tenacity and Partnership Leads to Change in Advance Parole Processing" (Mar. 19, 2019); <https://www.dhs.gov/blog/2019/03/19/tenacity-and-partnership-leads-change-ap-processing> (accessed Mar. 25, 2022).

<sup>200</sup> Information provided by stakeholders (Mar. 9, 2022).

<sup>201</sup> Information provided by USCIS (Jun. 3, 2022).



# IMPROVING ACCESS TO THE EXPEDITE PROCESS

## RESPONSIBLE DIRECTORATES

Service Center Operations and Field Operations

## INTRODUCTION

For some U.S. Citizenship and Immigration Services (USCIS) customers, the possibility of having their pending application or petition moved forward in the adjudication queue provides a much-needed lifeline. Especially because granting these expedite requests is discretionary, it is important that the process be credible and operate with integrity. USCIS itself recognizes this and has stated that “[b]ecause granting an expedite request means that USCIS would adjudicate the requestor’s benefit ahead of others

who filed earlier, USCIS carefully weighs the urgency and merit of each expedite request.”<sup>202</sup> Unfortunately, the procedures, requirements, and the agency’s responses to requests for this critical service are neither uniform nor transparent.

The process and timelines for acknowledging and resolving these requests varies across the directorates, and the agency does not maintain a universal mechanism for counting, tracking, or monitoring these requests.

The USCIS Policy Manual lists the criteria for expedites, which were modified in June 2021<sup>203</sup> and again in January 2022.<sup>204</sup> These modifications restored the ability for nonprofit organizations to make requests in furtherance of cultural interests and detailed the coordination required

<sup>202</sup> 1 USCIS Policy Manual, Pt. A, Ch. 5 (Apr. 7, 2022); <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-5> (accessed May 13, 2022).

<sup>203</sup> USCIS News Release, “USCIS Updates Policies to Improve Immigration Services” (Jun. 9, 2021); <https://www.uscis.gov/news/news-releases/uscis-updates-policies-to-improve-immigration-services> (accessed on Apr. 21, 2022).

<sup>204</sup> USCIS News Release, “USCIS Updates Guidance on Expedite Requests” (Jan. 25, 2022); <https://www.uscis.gov/newsroom/alerts/uscis-updates-guidance-on-expedite-requests> (accessed on Apr. 21, 2022).

for expediting requests for noncitizens with final orders in removal proceedings. Importantly, the agency added further examples to illustrate the grounds for expedited processing based on emergencies and urgent humanitarian needs.<sup>205</sup> While needed, these updates did not address the fact that USCIS is not consistently applying the criteria when considering requests.

In this article, the CIS Ombudsman explores the challenges and concerns customers experience when requesting expedited processing. We examine the variances in how different offices process expedite requests and apply the expedite guidance.

The lack of a consistent and transparent process, coupled with incomplete data collection and no mechanism for tracking outcomes, undercuts USCIS' ability to plan for this workload. Also, lack of standard quality assurance review of the outcomes undermines whether USCIS can provide this service in a fair and efficient manner. The current process aggravates the agency's efforts to meet its mission and serves neither customers nor the agency.

## RECOMMENDATIONS

To effectively provide this service, which considering the agency's severe backlog is increasingly becoming essential, we recommend USCIS explore the following options:

1. Establish centralized technological infrastructure and specialized personnel to intake and process expedite requests.
2. Create a new form for submitting expedite requests that is similar to Form I-912, *Request for Fee Waiver*.
3. Develop standardized guidance to the field and to customers about the requirements and process that USCIS uses to consider and assess requests, including how it acknowledges it has received a request, timelines for action, and how it communicates outcomes.
4. Engage in robust data collection to help project workloads and maintain accountability with how offices are interpreting and applying the guidance.

<sup>205</sup> Additionally, USCIS has taken steps to bring immediate relief to some essential individuals working in the healthcare and childcare industries. See fn. 9, *infra*.

## EXPEDITE CRITERIA

In general, USCIS adjudicates benefit requests based on the order in which they are received.<sup>206</sup> However, adjudication is subject to many factors, including how complex the case is, how much evidence the adjudicator must consider, whether additional facts exist that may impact the outcome, and issues as mundane as the adjudicator's vacation schedule. To qualify for expedited processing, the petitioner or applicant must demonstrate the following criteria or circumstances:<sup>207</sup>

- Severe financial loss to a company or person, provided that the need for urgent action is not the result of the petitioner's or applicant's failure to timely (1) file the benefit request or (2) respond to any requests for additional evidence.
- Emergencies or urgent humanitarian reasons, such as illness, disability, extreme living conditions, death in the family, or a critical need to travel to obtain medical treatment in a limited amount of time. (An emergency may also include an urgent need to expedite employment authorization for healthcare workers during a national emergency, such as the recent announcement to expedite employment authorization for health care and childcare workers during the ongoing COVID-19 pandemic.)
- Clear USCIS error.

In addition, expedites are available to:

- Nonprofit organizations (as designated by the Internal Revenue Service) whose request is in furtherance of the cultural and social interests of the United States, and
- Those who can demonstrate U.S. government interests (urgent cases for federal agencies such as the Department of Defense, Department of Labor, Department of Homeland Security, or other public safety or national security interests).

<sup>206</sup> An exception to this "first-in, first-out" adjudication order is in affirmative asylum applications, which changed its order of assignment and adjudication in 2018 to "last in, first out" order. See "USCIS to Take Action to Address Asylum Backlog" (Jan. 31, 2018); <https://www.uscis.gov/archive/uscis-to-take-action-to-address-asylum-backlog?msclkid=8f041a22cb8c11ec8d0c758e84490647> (accessed on Apr. 5, 2022).

<sup>207</sup> USCIS reviews requests on a case-by-case basis and has the sole discretion to decide whether to accommodate a request. USCIS Web page, "How to Make an Expedite Request" (Mar. 21, 2022); <https://www.uscis.gov/forms/filing-guidance/how-to-make-an-expedite-request> (accessed on Apr. 21, 2022).

USCIS policy contains two important caveats to how it handles expedite requests. The first is that “not every circumstance that fits in one of these categories will result in expedited processing.”<sup>208</sup> This means that an applicant may establish that they qualify to have their application expedited but USCIS still may not be able to expedite it. As backlogs have lengthened, this situation has become more common. Second, USCIS has stated that in order to increase efficiency, it does not provide justification or otherwise respond to questions regarding decisions on expedite requests.<sup>209</sup> Although USCIS does communicate with customers about some expedite requests, many receive no response. After not receiving a response, customers who submit what they presume to be eligible expedite requests often will reach out to USCIS again to inquire about their request. This uses more of the agency’s resources and frustrates the applicant, who is left without any understanding of why their request was rejected—especially when they appeared to meet the eligibility criteria.

### Expedite Requests Arrive Through Multiple Pathways

An applicant generally initiates an expedite request by calling the USCIS Contact Center or communicating with USCIS’ online virtual assistant Emma, although some can submit requests in writing to the office with jurisdiction over their case. When working through the Contact Center, a receipt number is required.<sup>210</sup> Certain benefit types have their own process for requesting an expedite, including intercountry adoption, appeals, asylum, and benefit requests pending outside the United States.<sup>211</sup> In addition, some expedite requests reach the agency through congressional inquiries and as case assistance requests submitted to the CIS Ombudsman.

The USCIS Contact Center uses a Service Request Management Tool (SRMT) request to forward expedite requests received by phone to the USCIS office with jurisdiction over the case.<sup>212</sup> If a petitioner, applicant, or legal representative requests an expedite by sending a secure message through their myUSCIS account, the Contact Center will submit an SRMT to the appropriate field office if there is sufficient information in the message to examine the request.<sup>213</sup> If needed, the Contact Center

will reach out to the person to validate the information before submitting the SRMT.

Although most requests come in through the Contact Center, some field offices also receive written expedite requests in person or by mail. While this was a common practice before COVID-19 safety measures were in place, stakeholders report that field offices have largely eliminated this process.<sup>214</sup> The Potomac Service Center accepts expedite requests by mail and the Vermont Service Center (VSC) only accepts expedites for Violence Against Women Act (VAWA) self-petitioners by mail. The Texas Service Center, Nebraska Service Center (NSC), and VSC (except for VAWA petitions) do not accept expedite requests by mail and provide a letter to the requestor advising that they call the Contact Center or use the e-Request tool.<sup>215</sup> When an expedite request is accepted by mail, USCIS processes it in the same manner as an expedite request submitted through another method.<sup>216</sup>

The agency does not have a single mechanism or method for tracking the total number of requests received other than those coming in through the Contact Center.<sup>217</sup> The office receiving the expedite request will review the information provided and, if needed, may solicit additional documentation. It then sends email guidance to the requestor on how to provide this information.<sup>218</sup> There is no standardized way of collecting information or standard requirements for documentation, and it appears that offices handle these requests differently.<sup>219</sup>

### USCIS Appears to Lack A Consistent Review Process

The process of considering an expedite request is confusing, impractical, and inconsistent for stakeholders. Although USCIS reviews expedite requests according to the guidance outlined in the Policy Manual,<sup>220</sup> the agency currently does not have a single standard operating procedure (SOP) for reviewing expedite requests. Each office determines its own process based on resources and duties as they are assigned.<sup>221</sup>

From our discussions with applicants, petitioners, and their representatives, it appears that stakeholder expectations of the expedite request process do not match the actual

<sup>208</sup> 1 USCIS Policy Manual, Pt. A, Ch. 5 (Apr. 7, 2022); <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-5> (accessed Apr. 21, 2022).

<sup>209</sup> *Id.*

<sup>210</sup> USCIS Web page, “How to Make an Expedite Request” (Dec. 28, 2021); <https://www.uscis.gov/forms/filing-guidance/how-to-make-an-expedite-request> (accessed on Apr. 21, 2022).

<sup>211</sup> Information provided by USCIS (May 11, 2022).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Information provided by stakeholders (Feb. 3, 2022).

<sup>215</sup> Information provided by USCIS (May 11, 2022).

<sup>216</sup> *Id.*

<sup>217</sup> Information provided by USCIS (Jan. 6, 2022).

<sup>218</sup> Information provided by USCIS (May 11, 2022).

<sup>219</sup> Information provided by stakeholders (Feb. 3, 2022).

<sup>220</sup> USCIS Web page, “How to Make an Expedite Request” (Dec. 28, 2021); <https://www.uscis.gov/forms/filing-guidance/how-to-make-an-expedite-request> (accessed on Apr. 21, 2022).

<sup>221</sup> Information provided by USCIS (May 11, 2022).

processing of an expedite request. The CIS Ombudsman understands that stakeholders generally expect that once they submit an expedite request, USCIS will direct it to the adjudicating officer reviewing the pending application or petition.<sup>222</sup> Hence, there is a general assumption that if the office agrees to expedite the case, USCIS will immediately act on the pending immigration benefit. However, unless they submit the request as a follow-up to an interview or in response to a request for evidence (RFE), it is rare that the request will go directly to an adjudicator. Rather, in most cases, the requests are reviewed by officers specifically assigned to expedite requests and they do not immediately send these requests to the adjudicating officer.<sup>223</sup>

At service centers, expedite requests may be reviewed by immigration services assistants or immigration services officers (ISOs). The ISO reviewing the expedite request may or may not be the officer that is or will be assigned to adjudicate the pending benefit request.<sup>224</sup> If the expedite request is granted, the reviewer will transfer the expedite request to the file. If the reviewer is not the ISO adjudicating the pending benefit, then he or she will send an email to the adjudicating ISO to let the officer know to expedite the case. The expedite request reviewer will flag in electronic systems the requests that will be accommodated.

In field offices, expedite requests are handled directly by the officers assigned the pending case or another officer assigned to review expedite requests. If an expedite request is granted, in most cases the reviewing officer will mark the file for expedited handling. If the file is at a service center, the local field office will request the file from the service center and request expedited handling of the file transfer.<sup>225</sup>

Initiating an expedite request is particularly problematic for individuals contacting the VSC and NSC for those who are afforded certain privacy protections, namely VAWA self-petitioners and for U and T visa-related customers. These applicants, or rather their representatives, can directly contact the Visa Unit at the service center having jurisdiction over their case. Problems arise, however, when the application is not a primary benefit pending at that unit, but an application pending elsewhere; the protections continue even after the primary benefit is secured. For example, applicants or their representatives contacting the NSC Humanitarian Unit Hotline to expedite an employment authorization application not pending at

the NSC will be instructed to call the Contact Center, as the NSC does not have jurisdiction over the application, but the confidentiality provisions of these cases prevent the Contact Center from handling the request. There appears to be no straightforward way to seek an expedite from the agency in these scenarios.<sup>226</sup>

Beyond the caveat that expedite requests appearing to meet the eligibility criteria may not result in an expedite, there is no transparency as to which expedite requests get accepted for review and which (even with similar circumstances) do not. Stakeholders have indicated that the agency rejects some expedite requests within the same business day, even immediately after receiving it, without providing the requestor an opportunity to submit additional documentation. Meanwhile, USCIS does not acknowledge other expedite requests at all.<sup>227</sup> The process is also inconsistent with respect to what happens when USCIS accepts an expedite request for review, whether and how to submit additional documentation, how long it takes to receive a decision, and even if USCIS will communicate the expedite decision to the requestor. Two offices receiving similar expedite requests may have very different abilities to handle the requests, and one may have the resources to accommodate it and one may not. This causes USCIS to appear like it is arbitrarily applying the criteria.<sup>228</sup>

### USCIS' Attempt to Clarify the Expedite Criteria

When applicants make an expedite request, the Policy Manual indicates reasons USCIS will consider for expediting an applicant's request. According to USCIS, based on stakeholder feedback, the most recent guidance published by the agency includes examples involving medical research, a university cultural program, and social outreach by a religious organization towards the development of cultural and social interests of the United States.<sup>229</sup>

In the most recent updates to the policy, USCIS also clarified that a company can demonstrate that it would suffer a severe financial loss if it is at risk of failing, losing a critical contract, or having to lay off other employees.<sup>230</sup> In addition, a company may establish severe financial

<sup>222</sup> Information provided by stakeholders (Feb. 8, 2022).

<sup>223</sup> Information provided by USCIS (May 11, 2022).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* At the National Benefits Center, the Customer Division reviews the expedite requests.

<sup>226</sup> For example, an adjustment of status application filed by a U visa holder might be pending at the NSC, but the employment authorization application filed with that adjustment application may be pending at a different service center. Information provided by stakeholders (Feb. 10, 2022).

<sup>227</sup> Information provided by stakeholders (Feb. 3, 2022).

<sup>228</sup> *Id.*

<sup>229</sup> Information provided by USCIS (May 11, 2022).

<sup>230</sup> *Id.* For example, a medical office may suffer severe financial loss if a gap in a doctor's employment authorization would require the medical practice to lay off its medical assistants.



loss where failure to expedite would result in a loss of critical public benefits or services. For individuals, the need to obtain employment authorization by itself, without evidence of other compelling factors, does not warrant expedited processing. However, job loss may be sufficient to establish severe financial loss for a person, depending on the individual circumstances.<sup>231</sup>

Stakeholders do not believe the updated guidance clarifies the criteria and there continues to be difficulty with submitting supporting documentation.<sup>232</sup> While those submitting an expedite request by mail can send in their supporting documentation with their request, others are far more limited. Individuals requesting expedited processing by calling the Contact Center or online using the “Ask Emma” tool are currently unable to submit supporting documentation using those methods.<sup>233</sup> USCIS has informed the CIS Ombudsman that it is currently working on enhancing the e-Request Case Inquiry Tool to accept expedite requests for specific case types, and that this path will allow USCIS to provide guidance on how the applicant or petitioner can provide this supporting documentation.<sup>234</sup>

The different layers of review involved in considering expedite requests, and the resources dedicated to each of those layers, arguably do not facilitate the direct and swift decisions the public might expect.<sup>235</sup> Even if an expedite request meets all the criteria, has compelling circumstances, and merits expedited processing, the underlying benefit application may be tied up in a different procedure or the file may not be available for adjudication. In those cases, the expedite cannot be granted.

### Lack of Data Collection and Analysis Hinders USCIS’ Work

Although USCIS can track how many expedite requests it receives through the Contact Center, it does not track the total number of expedite requests it receives through all pathways. It also does not retain complete statistics on the reasons for granting expedites or the results of the requests.<sup>236</sup> Because the agency lacks these tracking mechanisms, it does not have sufficient quantitative data or other feedback to help it assess whether it is following its own criteria or applying the criteria consistently.

<sup>231</sup> *Id.* For example, if someone would lose their job if they could not travel for work, this might warrant expedited treatment.

<sup>232</sup> Information provided by stakeholders (Feb. 3, 2022).

<sup>233</sup> Information provided by USCIS (May 11, 2022).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* For example, where USCIS cannot expedite a case that is being held for investigative purposes, depends on a site visit that has not taken place, is waiting for a related file, or for similar reasons.

<sup>236</sup> *Id.*

USCIS also does not compile the expedite requests into a single database. Although USCIS case management systems have codes that can indicate whether an expedite request was received, granted, or not granted, entering this information is a manual process and not mandatory. USCIS confirmed that the data is accordingly incomplete and therefore unreliable.<sup>237</sup> The lack of data integrity is troubling, given that it affects the agency’s ability to assess the extent of its workload and the resources required to address it.

The lack of complete data also compromises the agency’s ability to assess how adjudicating directorates are implementing the expedite guidance. Data would enable the agency to confirm where the needs for expedites are greatest, both by form type and location. It would assist USCIS in deploying resources to meet volatile adjudication demands. For example, if USCIS started receiving more expedite requests for a particular kind of EAD application, it could meet this need with additional resources in real time instead of waiting until processing times creep beyond acceptable parameters. While the data from the Contact Center gives the agency a partial picture of the demand for expedites, USCIS needs to be able to have a complete picture. As a fee-funded agency, this is particularly important for ensuring the proper alignment and allocation of resources, a fundamental aspect of any backlog reduction plan.

### Lack of Standard Quality Assurance Undermines Fairness and Efficiency

Those reviewing expedite requests generally do not work from an SOP, but they do rely upon the Policy Manual’s criteria for assessing eligibility. The field offices also maintain internal guidance on assessing an expedite request, and USCIS follows an SOP for congressional inquiries for expedite requests. The service centers, moreover, are working to develop an SOP and a way to provide informal guidance and feedback to the service centers.<sup>238</sup> Each adjudicating directorate maintains certain levels of supervisory review, depending on the type of expedite request being considered. For example, the service centers require supervisory review of decisions not to accommodate an expedite request for certain form types.<sup>239</sup> Quality assurance reviews on the decisions being made on expedites by USCIS are not uniform across the agency.

<sup>237</sup> Information provided by USCIS (Jan. 6, 2022).

<sup>238</sup> Information provided by USCIS (May 11, 2022).

<sup>239</sup> *Id.*

USCIS acknowledges gaps in this area. It recently expressed to the CIS Ombudsman that it would seek to engage with subject matter experts across the agency to better understand the reasons for denials and identify any potential trends.<sup>240</sup>

### The Snowball Effect of Expedite Requests

Although USCIS does not track all the expedite requests it receives, it did experience a sharp increase in FY 2021 for the expedite requests it does track. In FY 2020, the Contact Center received 63,561 requests; in FY 2021, it received 145,490 requests—a 129 percent increase.<sup>241</sup> While understandable given the increases in processing times due to the COVID-19 pandemic and other factors in FY 2020, this dramatic increase in expedite requests added to USCIS' workload at a time when it was already struggling with unprecedented backlogs. The backlogs constitute tremendous barriers to accessing immigration services, and USCIS has committed to reducing them by the end of FY 2023. However, a fair and efficient process for reviewing expedite requests could help mitigate the pain points caused by these delays.

The lack of a clear process exacerbates customers' concerns about the status of their pending immigration forms. Their concerns then generate new workloads across the immigration system as they make additional overtures to the Contact Center, inquiries to members of Congress that become inquiries to USCIS, and additional inquiries directly to field offices. The CIS Ombudsman's own case assistance workload has almost doubled in the last 2 years<sup>242</sup> and also creates additional work for USCIS. Even more detrimental to USCIS is that some applicants try to ensure a timelier favorable outcome by filing additional and sometimes duplicative applications because they are concerned about potential lapses in or violations of status, their finite eligibility for certain benefits, and other unresolved issues.<sup>243</sup> All of these further burden the agency's limited and already strained resources.

The impact of processing delays is perhaps most visibly demonstrated by requests related to employment authorization documents. In FY 2021, the CIS Ombudsman received thousands of requests for assistance

related to expedite requests for employment authorization applications, citing the need to avoid employment gaps and personal financial hardships due to lapses in the authorization. The CIS Ombudsman applauds some of the latest initiatives USCIS has implemented to avert lapses in employment, many of which this office previously recommended, such as the increased automatic extension period for certain EADs.<sup>244</sup> However, thousands of individuals in other categories still need to request expedited processing.

### Expanding Premium Processing Does Not Solve the Issue

Some have suggested that to unclog the expedite process, USCIS should consider broadening premium processing and eliminating the expedite process that currently exists. The belief is that those who can pay for premium processing will do so. However, even if USCIS makes premium processing broadly available, financial loss is the reason many applicants and petitioners request expedite processing. These include academic or nonprofit organizations who cannot afford to pay premium processing fees or applicants who have been placed on unpaid leave or let go from their employment when their EAD expired—a very typical scenario that has been particularly visible in the past few years of backlogs. The expedite request process is accordingly a necessary option for those who genuinely need expedited processing to prevent significant harm but cannot afford to pay for premium processing.

## RECOMMENDATIONS

### 1. *Establish centralized technological infrastructure and specialized personnel to intake and process expedite requests.*

USCIS could centralize the expedite request process by:

- Developing a public-facing portal to receive expedite requests and supporting documentation. An example to follow would be the recently created portal for

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> Through the fall of 2020 and winter of 2020–2021, the CIS Ombudsman expedited 4,608 of the total 14,618 requests for case assistance received. More than 70 percent of the expedited cases (3,304) related to Form I-765, *Application for Employment Authorization*. See CIS Ombudsman's Annual Report 2021, p. 4.

<sup>243</sup> Stakeholders mentioned that, in addition to making a transfer of preference category from EB-3 to EB-2, some are filing a second Form I-485, *Application to Register Permanent Residence or Adjust Status*, in an attempt to expedite the adjudication process. Information received by USCIS (Mar. 29, 2022).

<sup>244</sup> USCIS Web page, USCIS Increases Automatic Extension Period of Work Permits for Certain Applicants (May 3, 2022); <https://www.uscis.gov/newsroom/news-releases/uscis-increases-automatic-extension-period-of-work-permits-for-certain-applicants> (accessed May 4, 2022).

deported veterans seeking assistance returning home to the United States.<sup>245</sup>

- Exploring whether it can use myUSCIS to receive expedite requests and to maintain direct communication with requestors during the process.
- Using a centralized email address where individuals can submit a request along with supporting documentation.
- Assigning specialized staff at each adjudicating directorate to triage expedite requests, serve as a liaison with the requestor, and provide data collection, training, and strategic support. This could be done on either a national, regional, or local basis.

**2. Create a new form for submitting expedite requests that is similar to Form I-912, Request for Fee Waiver.<sup>246</sup>**

The form would help USCIS receive consistent information. It would also enable the agency to track information such as the reasons for the request, the types of forms for which expedites are requested, and the disposition of the request.

Creating a new expedite request form could also help the agency to consider collecting a small fee. Currently, the cost of processing expedite requests is spread as a cost attributable among all fee-generating form types. A service fee reflecting the cost of considering the expedite request would narrow the number of requests and align the process with the agency's operational realities while not

necessarily being overly burdensome for expedited processing requestors.<sup>247</sup>

**3. Develop standardized guidance to the field and to customers about the requirements and process that USCIS uses to consider and assess requests, including how it acknowledges it has received a request, timelines for action, and how it communicates outcomes.**

- Regardless of whether USCIS develops a new form and fee, it should create a national SOP to establish the methodology for triaging and evaluating expedite requests.
- USCIS should develop a specific training program to implement the SOP and provide more specific examples and guidance for interpreting the expedite criteria.
- USCIS should create an expedite request assessment worksheet that would guide reviewing officers in a standardized way on how to evaluate each request consistently and fairly.

**4. Engage in robust data collection to help project workloads and maintain accountability with how offices are interpreting and applying the guidance.**

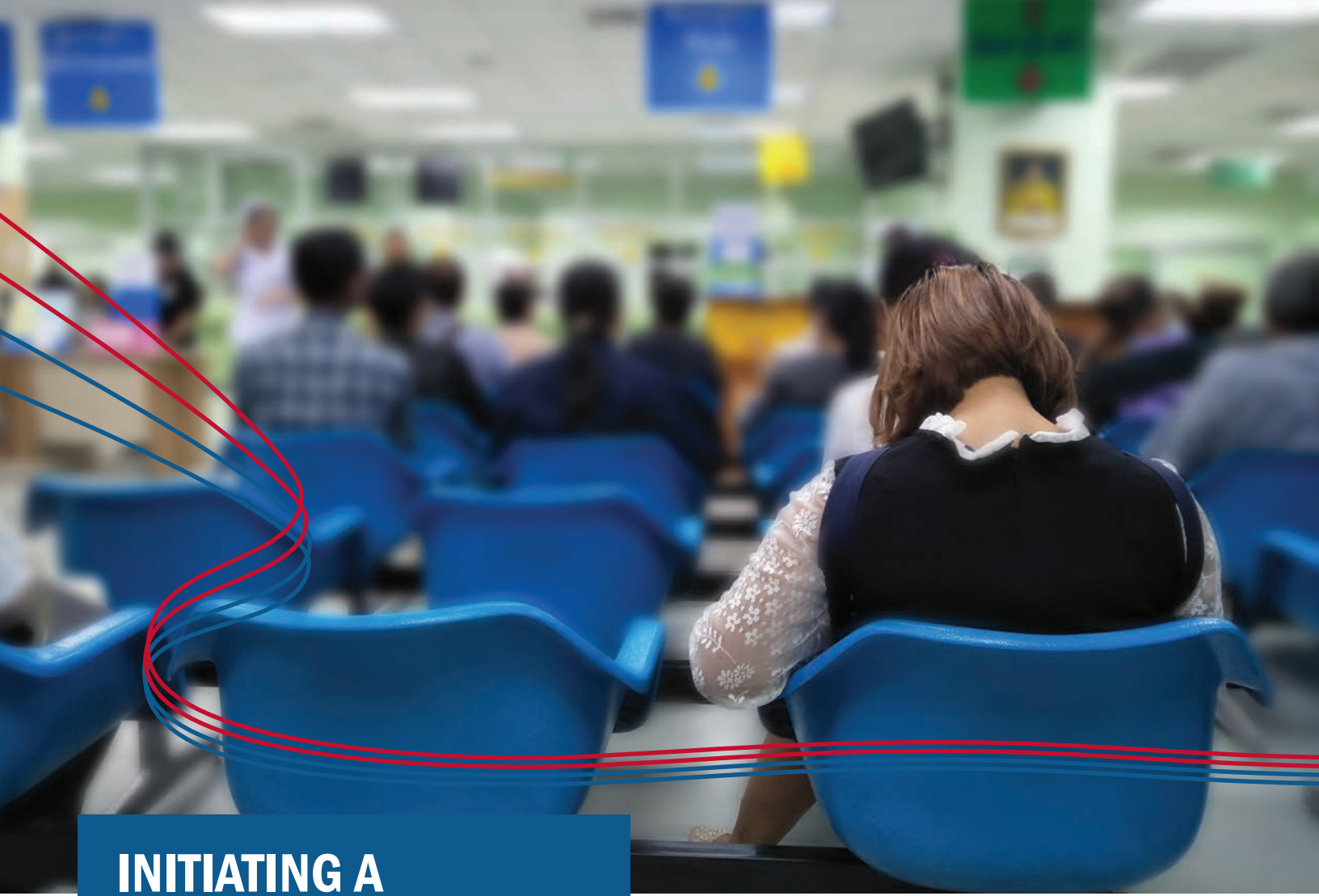
USCIS would benefit from full data on expedite requests to better analyze both the full impact expedites have on regular workloads and ensure offices apply the criteria consistently across similar situations and applications. A complete dataset would enable the agency to confirm where the needs for expedites are greatest, both by form type and location, and even better manage the actual adjudications of those applications where expedites are most requested, leading to reducing the need for expedites altogether.

<sup>245</sup> Exactly how many veterans have been deported is unknown because the federal government has failed to track that information appropriately. This new portal will provide previously removed veterans a fast and straightforward way to get assistance and help DHS track data to determine how to best meet its commitments for this initiative. See DHS Web page, "DHS, VA Launch New Online Services for Noncitizen Service Members, Veterans, and Their Families" (Feb. 7, 2022); <https://www.dhs.gov/news/2022/02/07/dhs-va-launch-new-online-services-noncitizen-service-members-veterans-and-their> (accessed on Apr. 21, 2022).

<sup>246</sup> Form I-912 standardizes how USCIS collects and analyzes statements and supporting documentation provided by the applicant with the fee waiver request. It also streamlines and expedites USCIS' decision by laying out the most salient evidence necessary for determining the requestor's inability to pay. Officers evaluate all information and evidence supplied in support of a fee waiver request when making a final determination. Each case is unique and is considered on its own merits. If USCIS grants the fee waiver, it will process the immigration benefit application. If USCIS does not grant the fee waiver, it will notify the applicant and instruct him or her to file a new application with the appropriate fee. See "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 85 Fed. Reg. 46788, 46913 (Aug. 3, 2020).

<sup>247</sup> For example, DHS explored ways to alleviate the pressure that the asylum workload places on the administration of other immigration benefits and determined that a minimal fee would mitigate fee increases for other immigration benefit requests. See "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 85 Fed. Reg. at 46844.

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# INITIATING A DISCUSSION ON WAYS TO ADDRESS THE AFFIRMATIVE ASYLUM BACKLOG

## RESPONSIBLE DIRECTORATE

Refugee, Asylum and International Operations

## INTRODUCTION

In 1994, facing what appeared to be an insurmountable backlog, the Immigration and Naturalization Service (INS) endeavored to reform asylum processing.<sup>248</sup> These efforts were largely the result of close collaboration with non-governmental organizations (NGOs) and were ultimately successful.<sup>249</sup> Nearly 30 years later, USCIS faces a similar challenge. With more than 430,000 asylum cases pending, USCIS' existing asylum system cannot meaningfully reduce its backlog, let alone keep pace with incoming applications.

<sup>248</sup> See "Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization," 59 Fed. Reg. 62284 (Dec. 5, 1994).

<sup>249</sup> See USCIS Web page, "Asylum Reform: Five Years Later" (Feb. 1, 2000); <https://www.uscis.gov/sites/default/files/document/news/Asylum.pdf> (accessed Feb. 24, 2022). See also, Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis—Charting a Way Forward*, Migration Policy Institute, September 2018, pp. 6–7; <https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward> (accessed Apr. 12, 2022); and David A. Martin, "Symposium, Making Asylum Policy: The 1994 Reforms," 70 Wash. L. Rev. 725, pp. 725–755 (1995).

If USCIS does not improve the quality and efficiency of asylum adjudications, the backlog will continue to grow—with dire consequences for vulnerable asylum applicants and their family members. Asylum processing delays can lengthen family separation, exacerbate mental health issues, impede economic stability, impair access to legal representation, and undermine the integrity of the asylum system.<sup>250</sup>

For those focused on the affirmative caseload, the complexities and nuances involved makes reaching consensus difficult. Regardless, the backlog requires and deserves not only attention, but action. The recommendations below are not intended to remedy all issues but rather spark a crucial discussion on different operational approaches to addressing the backlog. In the coming months, the CIS Ombudsman looks forward to refining these proposals through continued engagement—soliciting feedback from various stakeholders (practitioners, applicants, and other interested parties) on how to address both foreseen and unintended consequences of these approaches. In addition, consistent with evidence-based decision making, the CIS Ombudsman will endeavor to obtain necessary data from USCIS to support any recommendations.<sup>251</sup>

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## RECOMMENDATIONS

- Apply best practices from refugee processing to backlog reduction efforts.
- Identify and group cases to increase efficiencies in interviews and adjudications, to prioritize asylum applicants in need of immediate protection, and to deprioritize non-priority applicants, such as those that have other forms of relief available.
- Expand the role of the Asylum Vetting Center to triage cases into different case processing tracks that allow USCIS to use truncated or accelerated processing for certain groups of cases.

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<sup>250</sup> See Human Rights First, *Protection Postponed: Asylum Office Backlogs Cause Suffering, Separate Families, and Undermine Integration* (Apr. 9, 2021), <https://www.humanrightsfirst.org/resource/protection-postponed-asylum-office-backlogs-cause-suffering-separate-families-and-undermine> (accessed Apr. 11, 2022). See also, Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis—Charting a Way Forward*, Migration Policy Institute, September 2018, p. 1; <https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward> (accessed Apr. 12, 2022).

<sup>251</sup> In preparing this article, the CIS Ombudsman requested certain data from USCIS and received a partial response after the article was sent to publication. Accordingly, the CIS Ombudsman was unable to incorporate this information here but intends on using this data to develop future recommendations.

- Rethink case preparation processes to include case complexity analysis, focused interview guidance for specific caseloads, and interview orientation for applicants.
- Consider specialization, interview waivers, and simplifying final decisions as a way to increase case completions while supporting the welfare of officers and applicants.
- Implement a feedback loop between USCIS and the immigration court and target protection screening efforts to improve the accuracy of decisions and ensure the effective use of government resources.
- Engage with stakeholders on any new proposals to ensure meaningful backlog reduction.

These recommendations adhere to fundamental principles of fairness and equity. Each asylum applicant should be given a full and fair opportunity to present a claim. A fair process should strive for transparency and consistency in adjudications, as disparate outcomes across asylum offices or between USCIS and immigration courts can undermine efforts to create a more efficient and equitable process. In recognition of these core values, the proposed reforms include procedural and quality control safeguards to help ensure integrity, fairness, and consistency.

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## CAUSES OF THE BACKLOG AND ADDITIONAL CHALLENGES

In recent years, the CIS Ombudsman has written extensively about USCIS’ asylum backlog—its causes, effects on asylum seekers, and the efforts made to reduce it, including potential recommendations for further action.<sup>252</sup> In summary, the large volume of credible and reasonable fear screenings for recent arrivals at the border, with prioritized processing timeframes, has limited the Asylum Division’s capacity to address the affirmative asylum backlog.<sup>253</sup> Also, from FYs 2014 to 2017, USCIS received a surge in affirmative asylum filings which increased the backlog to unmanageable levels.<sup>254</sup> USCIS changed how it prioritizes cases when scheduling

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<sup>252</sup> See, e.g., CIS Ombudsman’s Annual Report 2020, pp. 40–54; CIS Ombudsman’s Annual Report 2017, pp. 37–42; and CIS Ombudsman’s Annual Report 2016, pp. 13–17.

<sup>253</sup> For a brief overview of U.S. asylum processing, including information on the credible and reasonable fear screening process, see CIS Ombudsman’s Annual Report 2020, pp. 41–43.

<sup>254</sup> See CIS Ombudsman’s Annual Report 2020, p. 44.

interviews in order to stem the flow of incoming receipts,<sup>255</sup> significantly reducing its ability to interview older cases. Although the agency has experienced consecutive fiscal years of declining affirmative asylum receipts since then,<sup>256</sup> a lack of adequate resources and physical space remain perennial issues, and recent challenges from the COVID-19 pandemic have significantly hampered USCIS' efforts to capitalize on decreased receipts.

To address the backlog, USCIS has increased staffing and facilities and developed tools to improve case processing.<sup>257</sup> The Asylum Division has relied on its modernized case management system, referred to as Global, to develop technological solutions that increase efficiencies. It also has implemented certain operational changes during the pandemic to provide continuity of services, such as video-assisted interviewing, remote interview participation, and expanded telework flexibilities.<sup>258</sup> Asylum offices also routinely conduct data sweeps of their backlogs to identify cases that they can process without an interview.<sup>259</sup>

Notwithstanding these efforts, USCIS received approximately 72,000 more asylum applications than it

could adjudicate over the last 2 fiscal years.<sup>260</sup> In this fiscal year, the Asylum Division is on pace to receive more applications and credible fear screening work than it originally projected.<sup>261</sup> It also is managing unanticipated workloads that it did not account for at the beginning of the fiscal year (such as continuing the Migrant Protection Protocols and Title 42 screenings) and preparing for a potential influx of applications due to growing humanitarian crises in Ukraine and Afghanistan.<sup>262</sup> Congress has noticed the steadily growing processing times<sup>263</sup> and appropriated funds to USCIS to reduce the asylum backlog.<sup>264</sup> At the same time, the Asylum Division needs additional resources to implement a new interim final rule that revises how it processes certain applications for humanitarian protection.<sup>265</sup> These factors have resulted in nearly 620 vacancies in the Asylum Division.<sup>266</sup> These future hires will join a less experienced asylum officer and

<sup>255</sup> Currently, USCIS prioritizes the most recently filed cases when scheduling interviews under its "Last-in, First-out" (LIFO) policy. USCIS established the LIFO policy to discourage individuals from filing potentially meritless asylum applications in order to get employment authorization while their case is pending in a long backlog. Under this policy, USCIS schedules asylum interviews using the following order of priority—first priority: rescheduled interviews; second priority: applications pending 21 days or less; and third priority: all other pending applications starting with newer filing and working back towards older filings. See USCIS Web page, "Affirmative Asylum Interview Scheduling" (Jan. 26, 2018); <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling> (accessed Apr. 12, 2022). "Without LIFO scheduling, the affirmative asylum backlog would rapidly increase above present levels." USCIS Webpage, "AILA Meeting with the USCIS Refugee, Asylum & International Operations Directorate" (Jan. 5, 2022); [https://www.uscis.gov/sites/default/files/document/outreach-engagements/AILA\\_Meeting\\_with\\_the\\_USCIS\\_Refugee\\_Asylum\\_and\\_International\\_Operations\\_Directorate.pdf](https://www.uscis.gov/sites/default/files/document/outreach-engagements/AILA_Meeting_with_the_USCIS_Refugee_Asylum_and_International_Operations_Directorate.pdf) (accessed Feb. 24, 2022).

<sup>256</sup> After reaching a high-water mark of 141,695 asylum receipts in FY 2017, the number of affirmative asylum applications filed per year has continued to decrease: 106,147 in FY 2018 (-25 percent); to 95,959 in FY 2019 (-10 percent); to 94,077 in FY 2020 (-2 percent); and to 61,158 in FY 2021 (-35 percent). See letter from USCIS Director Ur Jaddou to Representative Cicilline (Dec. 15, 2021); [https://www.uscis.gov/sites/default/files/document/foia/Affirmative\\_asylum\\_application\\_backlog-Representative\\_Cicilline.pdf](https://www.uscis.gov/sites/default/files/document/foia/Affirmative_asylum_application_backlog-Representative_Cicilline.pdf) (accessed Apr. 11, 2022). See also USCIS Web page, "Data Set: All USCIS Application and Petition Form Types;" <https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data> (accessed Apr. 28, 2022).

<sup>257</sup> For further information on recent USCIS efforts to address its asylum backlog, see "Backlog Reduction of Pending Affirmative Asylum Cases" (Oct. 20, 2021); <https://www.dhs.gov/sites/default/files/2021-12/USCIS%20-%20Backlog%20Reduction%20of%20Pending%20Affirmative%20Asylum%20Cases.pdf> (accessed Feb. 22, 2022).

<sup>258</sup> See "Backlog Reduction of Pending Affirmative Asylum Cases," pp. 8–9 (Oct. 20, 2021); <https://www.dhs.gov/sites/default/files/2021-12/USCIS%20-%20Backlog%20Reduction%20of%20Pending%20Affirmative%20Asylum%20Cases.pdf> (accessed Feb. 22, 2022).

<sup>259</sup> *Id.*

<sup>260</sup> Almost a 2:1 ratio between the number of applications received (154,292) and the number of applications adjudicated (78,958) during this same period. See USCIS Web page, "Data Set: All USCIS Application and Petition Form Types;" <https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data> (accessed Apr. 11, 2022).

<sup>261</sup> For FY 2022, USCIS projected receiving 90,000 credible fear cases; 70,000 affirmative asylum cases; and 12,100 reasonable fear cases. Information provided by USCIS (Mar. 10, 2022).

<sup>262</sup> Under section 2502(c) of Pub. L. 117-43, USCIS must conduct the initial asylum interview of certain Afghan parolees who entered on or after July 31, 2021, not later than 45 days after the filing date and adjudicate the asylum application within 150 days after the filing date unless there are exceptional circumstances. See Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. 117-43, § 2502(c), 135 Stat. 377 (Sep. 30, 2021).

<sup>263</sup> See e.g., Letters from former USCIS Acting Director Tracy Renaud to the following members of Congress: Representative Andy Biggs (Mar. 26, 2021); [https://www.uscis.gov/sites/default/files/document/foia/USCIS\\_asylum\\_officers-Representative\\_Biggs.pdf](https://www.uscis.gov/sites/default/files/document/foia/USCIS_asylum_officers-Representative_Biggs.pdf) (accessed Apr. 11, 2022); Representative Joe Neguse (Jul. 7, 2021); [https://www.uscis.gov/sites/default/files/document/foia/Asylum\\_interviews-Rep\\_Neguse\\_7.7.21.pdf](https://www.uscis.gov/sites/default/files/document/foia/Asylum_interviews-Rep_Neguse_7.7.21.pdf) (accessed Apr. 11, 2022); and Representative Gerald Connolly (Jul. 29, 2021); [https://www.uscis.gov/sites/default/files/document/foia/Asylum\\_Cases\\_Pending-Rep\\_Connolly\\_7.29.21\\_0.pdf](https://www.uscis.gov/sites/default/files/document/foia/Asylum_Cases_Pending-Rep_Connolly_7.29.21_0.pdf) (accessed Apr. 11, 2022). See also, e.g., letters from USCIS Director Ur Jaddou to the following members of Congress: Senator Dianne Feinstein (Sep. 8, 2021); [https://www.uscis.gov/sites/default/files/document/foia/Backlogs\\_in\\_various\\_programs-Senator\\_Feinstein.pdf](https://www.uscis.gov/sites/default/files/document/foia/Backlogs_in_various_programs-Senator_Feinstein.pdf) (accessed Apr. 11, 2022); and Representative Cicilline (Dec. 15, 2021); [https://www.uscis.gov/sites/default/files/document/foia/Affirmative\\_asylum\\_application\\_backlog-Representative\\_Cicilline.pdf](https://www.uscis.gov/sites/default/files/document/foia/Affirmative_asylum_application_backlog-Representative_Cicilline.pdf) (accessed Apr. 11, 2022).

<sup>264</sup> See Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. 117-43, § 132, 135 Stat. 351 (Sep. 30, 2021). See also Consolidated Appropriations Act, 2022, Pub. L. 117-103 (Mar. 15, 2022).

<sup>265</sup> See "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," 87 Fed. Reg. 18078 (Mar. 29, 2022). Notably, the rule is intended to reduce the growth in the backlog of asylum applications in immigration courts.

<sup>266</sup> As of February 11, 2022, the Asylum Division is authorized for 2,091 employees, 1,022 of which are field asylum officers. There were 621 vacancies as of this date, with 384 asylum officer vacancies. Information provided by USCIS (Mar. 10, 2022).

supervisory corps<sup>267</sup> and may have a steep learning curve as the agency begins to interview at full capacity again.<sup>268</sup>

In the face of these challenges, USCIS has committed to reducing both the asylum backlog and overall processing times.<sup>269</sup> To achieve these ambitious goals, the agency is seeking to implement meaningful technological changes to its underlying processes.<sup>270</sup> While these measures are necessary, the CIS Ombudsman believes that further operational changes are needed to reduce the backlog.

## BACKLOG REDUCTION: POTENTIAL APPROACHES

Although there are notable distinctions between overseas refugee processing and domestic asylum processing with respect to access,<sup>271</sup> they both demonstrate a commitment to international humanitarian values and officers in both programs apply the same legal standards. The U.S. Refugee Admissions Program (USRAP) and its partners, such as the United Nations High Commissioner for Refugees (UNHCR), use a principled approach to protecting asylum-seekers that not only applies to the Asylum Division's workload but also offers best practices and creative solutions to potentially increase efficiencies.

*Grouping Cases to Prioritize Those Most in Need of Protection.* USRAP relies on predefined groups to identify individuals in these groups that are of special humanitarian concern and are likely to qualify for admissions as refugees under U.S. law.<sup>272</sup> These designations are made based on shared characteristics that define the group and typically stress the importance of nationality, ethnicity, and/or

religion.<sup>273</sup> In most cases, these shared characteristics help explain the basis of the applicant's asylum claim and tend to result in a more efficient interview and adjudication. Applying a similar concept to the asylum backlog would establish a necessary foundation for understanding the makeup of the current backlog and how best to modernize processing. It would also allow USCIS to quickly identify and process claims for those in most need of protection.

Before defining any groups or case profiles, USCIS must first analyze the characteristics of the applicants in its asylum backlog. USCIS can identify a set of variables that: (1) it can reliably gather from Global and (2) are most useful in assessing which applicants need immediate protection. This may include variables such as nationality, race, ethnicity, tribal group, religion, date of entry into the United States, and gender identity.<sup>274</sup> USCIS then can seek to identify particular combinations of variables (such as nationality and gender, or nationality and membership in a religious or ethnic minority) that might enable more efficient interviews and adjudications. Specifically, organizing the backlog into such categories would allow the agency to establish protection priorities and employ another best practice of UNHCR—triaging and differentiated case processing modalities.

### Concerns and necessary considerations:

- Unlike USRAP, noncitizens have unrestricted access to the U.S. asylum system. This unfettered access results in increasingly difficult choices with respect to categorization and prioritization. Due to the significant harms imposed by current processing times, establishing reliable protection priorities for asylum applicants in the backlog will be challenging.
- Asylum law is meant to be neutral and any efforts to prioritize certain categories of cases may be harmful to maintaining impartiality.

*Triaging and Creating Different Case Processing Tracks.* Triaging allows USCIS to identify which groups might benefit from truncated or accelerated processing and which groups require regular processing. While each applicant deserves an opportunity to present their case, triaging applications into distinct case processing tracks lets the agency tailor interviews and adjudications based on applicants' circumstances. Triaging could also enable USCIS to identify potentially frivolous, fraudulent, or

<sup>267</sup> Information provided by USCIS (Mar. 16, 2022).

<sup>268</sup> In FYs 2019 and 2020, USCIS embarked on an aggressive asylum officer hiring initiative in which USCIS aimed to achieve 100 percent onboard staffing. This campaign was successful. From FY 2019 to FY 2020, onboard asylum officer staffing increased by approximately 52 percent and exceeded the authorized asylum officer level. This recent staffing growth, coupled with the inability to gain steady interview experience during the pandemic, has resulted in a less experienced asylum officer corps. Information on USCIS staffing obtained from letter from former USCIS Acting Director Tracy Renaud to Representative Andy Biggs (Mar. 26, 2021); [https://www.uscis.gov/sites/default/files/document/foia/USCIS\\_asylum\\_officers-Representative\\_Biggs.pdf](https://www.uscis.gov/sites/default/files/document/foia/USCIS_asylum_officers-Representative_Biggs.pdf) (accessed Apr. 11, 2022).

<sup>269</sup> Information provided by USCIS Asylum Division Quarterly Stakeholder Meeting (Feb. 23, 2022).

<sup>270</sup> *Id.*

<sup>271</sup> In order to access USRAP individuals must fall within a processing priority designed to identify which refugee seekers are "of special humanitarian concern" to the United States. Conversely, there are no limitations on accessing the asylum system and any noncitizen present in the United States may seek asylum.

<sup>272</sup> See Department of State Web page, "Report to Congress on Proposed Refugee Admissions for Fiscal Year 2022" (Sep. 20, 2021); <https://www.state.gov/report-to-congress-on-proposed-refugee-admissions-for-fiscal-year-2022/> (accessed Feb. 24, 2022).

<sup>273</sup> *Id.*

<sup>274</sup> While additional variables such as political opinion and particular social group would greatly assist in assessing applicants' protection needs, it is the CIS Ombudsman's understanding that the data points currently captured in Global are limited.



non-meritorious claims while ensuring bona fide claims are adjudicated efficiently.

USCIS already triages certain cases for differentiated case processing, such as cases that can be completed without conducting an interview.<sup>275</sup> This currently includes identifying pending asylum cases where applicants obtained lawful permanent resident status or U.S. citizenship; where there is evidence that USCIS may lack jurisdiction because the applicant is in immigration proceedings (excluding unaccompanied children) or there are credible fear or reasonable fear records;<sup>276</sup> or where there is evidence of abandonment.<sup>277</sup> In 2018, USCIS initiated a pilot program to begin issuing Notices of Untimely Filing and Interview Waiver to applicants who applied for asylum more than 10 years after entry.<sup>278</sup> These applicants typically apply for asylum in order to be placed into removal proceedings so they can seek cancellation of removal (cancellation).<sup>279</sup> The notice provides these applicants with an opportunity to voluntarily waive the asylum interview and receive a Notice to Appear (NTA) in immigration court to request relief from removal.

To accurately identify distinct case processing tracks, USCIS will need to expand its triage efforts. To begin, it will need to create additional case processing tracks. UNHCR's differentiated case processing modalities may provide an appropriate framework because they seek to

offer efficient protection for those most in need while maintaining standards of quality and fairness.<sup>280</sup> This approach recognizes that straightforward cases often require less processing than complex cases. For example, UNHCR's simplified processing modality streamlines either the interview or assessment writing, or both.<sup>281</sup> Applying this approach would encourage asylum officers to focus their interviews only on core issues of the asylum claim and help simplify decision-writing. Another UNHCR case processing modality, accelerated processing, would require USCIS to systematically identify cases in its backlog that are manifestly in need of protection.<sup>282</sup>

USCIS will also need to develop clear and objective criteria to ensure that it consistently triages cases into the appropriate case processing track. UNHCR considers such factors as whether there are indications of a claim being manifestly well-founded or manifestly unfounded,<sup>283</sup> whether a presumption of eligibility or a prima facie approach applies,<sup>284</sup> and the high or low refugee status recognition rates<sup>285</sup> for caseloads with a high degree of similarity in claims. Other factors that USCIS may consider include, but are not limited to, case complexity (that is, national security concerns, presence of bars to applying for asylum, and/or bars from a grant of asylum); country of origin information that establishes a pattern or practice of persecution towards members of a particular group; and the presence of exigent circumstances that require prioritization (such as urgent humanitarian reasons). Creating separate tracks for unique subsets of cases, such as applicants who are unaccompanied children, could further enhance due process protections and simplify procedures.

In establishing its triage criteria, USCIS could review historical data to determine how certain variables impact

<sup>275</sup> See "Backlog Reduction of Pending Affirmative Asylum Cases," p. 8 (Oct. 20, 2021); <https://www.dhs.gov/sites/default/files/2021-12/USCIS%20-%20Backlog%20Reduction%20of%20Pending%20Affirmative%20Asylum%20Cases.pdf> (accessed Feb. 22, 2022).

<sup>276</sup> "Individuals are in expedited removal proceedings if they have received a Notice and Order of Expedited Removal (Form I-860) that remains outstanding. If the individual is in expedited removal, USCIS does not have jurisdiction over an I-589 filed by that individual, even if the individual is paroled out of immigration detention." USCIS Asylum Division, "Affirmative Asylum Procedures Manual" p. 74 (May 17, 2016); <https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf> (accessed May 25, 2022).

<sup>277</sup> Information provided by USCIS (Apr. 9, 2022).

<sup>278</sup> Information provided by USCIS Asylum Division Quarterly Stakeholder Meeting (Nov. 16, 2018). To further address this caseload, stakeholders have recommended that DHS and DOJ establish a separate process for individuals to affirmatively apply for cancellation while also allowing USCIS officers to adjudicate such requests. See Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis—Charting a Way Forward*, Migration Policy Institute, September 2018, pp. 27–28; <https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward> (accessed Apr. 12, 2022). See also Human Rights First, *Protection Postponed: Asylum Office Backlogs Cause Suffering, Separate Families, and Undermine Integration* (Apr. 9, 2021), <https://www.humanrightsfirst.org/resource/protection-postponed-asylum-office-backlogs-cause-suffering-separate-families-and-undermine> (accessed Apr. 11, 2022).

<sup>279</sup> Cancellation of removal is a form of a humanitarian relief that may only be received during removal proceedings before an immigration judge. See INA § 240A(b)(1). See also Information provided by USCIS Asylum Division Quarterly Stakeholder Meeting (Nov. 16, 2018) ("The overwhelming majority of these cases are not putting forward significant claims for exceptions to the one-year filing deadline, nor are they attempting to put forward individualized claims for asylum. Instead, they appear to be applying simply to get work authorization and placement into removal proceedings in order to seek cancellation of removal.")

<sup>280</sup> UNHCR, *Aide-Memoire & Glossary of Case Processing Modalities, Terms and Concepts Applicable to RSD Under UNHCR's Mandate (The Glossary)*, p. 4 (2020); <https://www.refworld.org/docid/5a2657e44.html> (accessed Apr. 11, 2022).

<sup>281</sup> UNHCR, *The Glossary*, p. 9.

<sup>282</sup> Applicants that are manifestly in need of protection may include applicants with identified heightened physical and/or legal protection needs. See UNHCR, *The Glossary*, p. 8.

<sup>283</sup> UNHCR, *The Glossary*, pp. 20–21.

<sup>284</sup> UNHCR, *The Glossary*, pp. 22–23.

<sup>285</sup> "UNHCR uses two rates to compute the proportion of refugee claims accepted during the year. The Refugee Recognition Rate divides the number of asylum-seekers granted Convention refugee status by the total number of accepted (Convention and, where relevant, complementary protection) and rejected cases. The Total Recognition Rate divides the number of asylum-seekers granted Convention refugee status and complementary form of protection by the total number of accepted (Convention and, where relevant, complementary protection) and rejected cases." UNHCR *Statistical Yearbook 2009*, Chapter IV, *Asylum and Refugee Status Determination* (Oct. 2010); <https://www.unhcr.org/en-us/statistics/country/4ce532ff9/unhcr-statistical-yearbook-2009.html> (accessed Apr. 28, 2022).

asylum grant rates.<sup>286</sup> For example, asylum applicants who are nationals of a certain country may have a relatively high grant rate attributable to their religion. When further examining this data, USCIS may discover other variables (race, ethnicity, gender, political opinion, etc.) that are common among this cohort. Analyzing these data trends could allow USCIS to triage based on similar claims. USCIS could further enhance its triage criteria by reviewing the immigration courts' decision rates by nationality.<sup>287</sup> Reviewing this court data could help USCIS to confirm trends or identify new patterns that need to be reconciled with its own decision rates.

USCIS will need to implement sufficient quality assurance oversight to ensure it triages cases accurately, and the agency will most likely need to update its criteria periodically.<sup>288</sup> The differentiated case processing approach does not seek to undermine the case-by-case analysis that asylum officers must conduct. Rather, it attempts to use USCIS' data to inform the interview, including the length, and improve adjudication efficiency. While each asylum case is unique, harnessing data and analytics to identify trends (such as grant and referral rates for caseloads with a high degree of similarity in asylum claims) would allow USCIS to adjudicate more efficiently. Furthermore, it will enable USCIS to adapt other important features of refugee processing—such as case preparation and specialization.

### Concerns and necessary considerations

- Triaging cases into certain processing tracks may result in asylum officer bias and discriminatory decision-making against certain nationalities.
- Considering past grant rates may negatively impact triage efforts because previous policies made it exceedingly difficult for certain populations to receive asylum.

- Opaque triage criteria may prevent a sense of agency for asylum seekers and their legal representatives.

*Rethinking Case Preparation.* Resettlement Support Centers (RSC) provide a useful model for the type of case preparation needed for efficient adjudications. RSCs are managed by an NGO, an international organization, or U.S. embassy contractors.<sup>289</sup> RSC staff conduct pre-screening interviews of prospective refugees and prepare eligible refugee applications for USCIS refugee officers to interview.<sup>290</sup> This preparation allows refugee officers to focus on relevant or disputed issues. The Asylum Division should strive to perform similar case preparation through its Asylum Vetting Center and consider partnering with UNCHR or NGOs to help applicants prepare for their interviews, particularly for those without legal representation.<sup>291</sup> Case preparation could also serve as a necessary quality assurance mechanism for triaging, helping USCIS periodically improve its criteria (such as by identifying cases where a presumption of eligibility should apply). It could also allow USCIS to identify material issues in advance to create a more efficient interview.

Case preparation should go beyond conducting background checks. For example, effective case preparation could:

- Develop focused interview guidance for a specific caseload that is grounded in robust country of origin information. It could assist in developing potential interview questions for more complex cases by flagging inconsistencies, summarizing instances of past harm and their nexus to protected grounds, and providing helpful guidance on novel particular social groups.
- Seek to fill data gaps in Global by identifying basis of eligibility (such as cognizable particular social groups or political opinions) that may result in more informed lines of inquiry.
- Include an interview orientation to reduce no-show rates,<sup>292</sup> as most applicants in the backlog have waited several years for their interview date. This orientation could be conducted remotely (telephonically or

<sup>286</sup> USCIS has acknowledged that certain factors account for significant differences in case approval rates, such as timeliness in filing for asylum; geographic subregion of nationality; and the freedom score of an applicant's country of nationality. See "Quinquennial Report on Asylum Decision Trends and Factors" (Oct. 23, 2017); [https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20Quinquennial%20Report%20on%20Asylum%20Decision%20Trends%20and%20Factors\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20Quinquennial%20Report%20on%20Asylum%20Decision%20Trends%20and%20Factors_0.pdf) (accessed Feb. 22, 2022). Currently, Global does not capture the basis for eligibility identified on the Form I-589 (i.e., race, religion, nationality, political opinion, membership in a particular social group). As a potential workaround, USCIS could review the basis for eligibility when granting cases, which it does track, to make educated assumptions about its pending inventory.

<sup>287</sup> See EOIR Web page, "EOIR Adjudication Statistics, Asylum Decision Rates by Nationality" (Jan. 19, 2022); <https://www.justice.gov/eoir/page/file/1107366/download> (accessed Apr. 12, 2022).

<sup>288</sup> UNHCR deploys its case processing modalities with sufficient flexibility so that it can identify individual cases that are not suitable for a particular modality and channel them to the appropriate case processing stream. UNHCR, *The Glossary*, p. 6.

<sup>289</sup> See Department of State Web page, "Refugee Admissions: Application and Case Processing" <https://www.state.gov/refugee-admissions/application-and-case-processing/> (accessed Apr. 11, 2022).

<sup>290</sup> See Andorra Bruno, Congressional Research Service, "Refugee Admissions and Resettlement Policy," p. 6 (Dec. 18, 2018).

<sup>291</sup> The efficiencies of legal representation have been studied in various contexts. Although not part of this report, the CIS Ombudsman believes that expanded legal representation in the asylum context holds significant potential for applicants as well as the government. See e.g., Vera Institute of Justice Fact Sheet, "Why Does Representation Matter? The Impact of Legal Representation in Immigration Court" (Nov. 2018); <https://www.vera.org/downloads/publications/why-does-representation-matter.pdf> (accessed Jun. 2, 2022).

<sup>292</sup> As of February 24, 2022, USCIS had over 10,000 pending cases where the applicant either failed to appear for an interview or the interview needs to be rescheduled. Information provided by USCIS (Mar. 10, 2022).

through video teleconference) either before or shortly after scheduling the interview. It could help ensure applicants are aware of their upcoming interview and have adequate time to prepare. It could further contribute to a more efficient interview by helping set expectations, identifying stale evidence in need of updating, and reviewing legal requirements.

Stakeholders often believe that asylum officers do not always have adequate time to conduct a complete review of each case and that this often leads to unnecessarily lengthy interviews.<sup>293</sup> USCIS can address this concern through effective case preparation that helps to focus asylum officers' review of each case, thus relieving some of the time pressures experienced.

*Specialization.* Triaging cases with similar asylum claims into certain processing tracks may encourage and even require specialization among asylum officers.<sup>294</sup> For example, a case processing track for unaccompanied children could be handled by officers that have specific expertise in child-sensitive interview techniques and an in-depth knowledge of the legal issues affecting children's claims.<sup>295</sup> Similar to refugee processing,<sup>296</sup> specialization could:

- Enable the Asylum Division to tailor its training to prepare officers for specific caseloads.
- Allow asylum officers to become more familiar with country conditions and confident in their ability to identify and address common material issues, resulting in a more efficient interview.

<sup>293</sup> Information provided by stakeholders (Feb. 23, 2022). See also "Lives in Limbo: How the Boston Asylum Office Fails Asylum Seekers" (Mar. 2022); <https://mainelaw.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails-Asylum-Seekers-FINAL-1.pdf>.

<sup>294</sup> According to UNHCR, adopting certain case processing modalities such as simplified processing is "premised on a high degree of familiarity with a particular caseload/profile and therefore can only be implemented where an operation has experienced decision-makers with knowledge of the specific caseload."

<sup>295</sup> This is an approach that the CIS Ombudsman has previously advocated for in Special Immigrant Juvenile Adjudications. See CIS Ombudsman Recommendation, "Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications" (Dec. 11, 2015); [https://www.dhs.gov/sites/default/files/publications/CISOMB%20SIJ%20Recommendation%202015\\_2.pdf](https://www.dhs.gov/sites/default/files/publications/CISOMB%20SIJ%20Recommendation%202015_2.pdf) (accessed Jun. 2, 2022); CIS Ombudsman Recommendation, "Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices" (Apr. 15, 2011); [https://www.dhs.gov/sites/default/files/publications/sij\\_adjudications\\_an\\_opportunity\\_for\\_the\\_adoption\\_of\\_best\\_practices.pdf](https://www.dhs.gov/sites/default/files/publications/sij_adjudications_an_opportunity_for_the_adoption_of_best_practices.pdf) (accessed Jun. 2, 2022).

<sup>296</sup> The Refugee Division typically uses this approach, and it appears to be more efficient than the random assignment process that asylum offices currently use. For example, the Refugee Division uses pre-departure briefings for its officers. These briefings cover common adjudication issues that often arise and provides general information about the populations that officers will interview in the assigned region, which includes country of origin information. Asylum officers are responsible for conducting their own country conditions research. Although individual offices may conduct training relevant to their local caseloads, officers do not work exclusively on cases that are directly related to the training received.

To promote consistency, USCIS should coordinate its specialization efforts across its asylum offices to the greatest extent possible. USCIS has previously acknowledged that grant rates vary significantly both within and between the offices,<sup>297</sup> and stakeholders have raised this as a serious concern.<sup>298</sup> If officers across several different offices adjudicate similar claims, specialization (and triaging) would allow USCIS to better monitor and account for any adjudicative inconsistencies in cases that are truly comparable. This may result in better quality assurance and help to address factors that tend to influence asylum rates, such as an asylum office's cultural norms or implicit bias among officers and supervisors. The Asylum Division should also seek to rotate officers between specialized and/or non-specialized case dockets to avoid burnout and "compassion fatigue" that may result from too much repetition.

## EXPANDED ROLE FOR THE ASYLUM VETTING CENTER

USCIS created the Asylum Vetting Center (AVC) in 2017 to coordinate backlog reduction efforts, support fraud investigations, and centralize intake and case prescreening to allow officers to focus more time on conducting interviews and completing adjudications.<sup>299</sup> Physical construction delays have stalled these efforts, but when construction is complete, the AVC will have space for over 400 employees (285 federal employees and 144 contractors) and up to 120,000 A-Files.<sup>300</sup> As of February 2022, the AVC had 36 employees onboard (25 asylum positions and 11 Fraud Detection and National Security Directorate (FDNS) positions).<sup>301</sup> The AVC's current workload entails adjudicating I-730 petitions; performing security checks for select asylum offices; intaking Forms

<sup>297</sup> "For all asylum applications, asylum offices exhibited a range of grant (i.e., approval) rates from FYs 2010–2014. During that timeframe, the San Francisco Asylum Office had the highest grant rate, at 69 percent of all applications, and the New York Asylum Office had the lowest grant rate, at 20 percent of all applications... Individual Asylum Officers within each office also exhibited a range of approval percentages." See "Quinquennial Report on Asylum Decision Trends and Factors," pp. 14–15 (Oct. 23, 2017); [https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20Quinquennial%20Report%20on%20Asylum%20Decision%20Trends%20and%20Factors\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20Quinquennial%20Report%20on%20Asylum%20Decision%20Trends%20and%20Factors_0.pdf) (accessed Feb. 22, 2022).

<sup>298</sup> See "Lives in Limbo: How the Boston Asylum Office Fails Asylum Seekers" (Mar. 2022); <https://mainelaw.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails-Asylum-Seekers-FINAL-1.pdf>. See also Nogales, J. R., Schoenholtz, A., & Schrag, P., "Refugee Roulette: Disparities in Asylum Adjudication," 60 *Stanford L. Rev.* 295 (2007).

<sup>299</sup> See "Backlog Reduction of Pending Affirmative Asylum Cases," p. 8 (Oct. 20, 2021); <https://www.dhs.gov/sites/default/files/2021-12/USCIS%20-%20Backlog%20Reduction%20of%20Pending%20Affirmative%20Asylum%20Cases.pdf> (accessed Feb. 22, 2022). See also CIS Ombudsman's Annual Report 2019, pp. 56–61.

<sup>300</sup> Information provided by USCIS (Feb. 4, 2022).

<sup>301</sup> *Id.*

I-589, *Applications for Asylum and for Withholding of Removal*, that were previously filed locally (such as *nunc pro tunc* applications); supporting filings related to certain settlement agreements; and assisting offices in responding to change of address requests filed in connection with defensive asylum cases.<sup>302</sup>

Triaging and rethinking case preparation would require an expanded role for the AVC. While the AVC initially created and conducted case triage efforts, the Asylum Division's current approach is decentralized as individual asylum offices now drive the process.<sup>303</sup> Similarly, the Asylum Division initially operated its Notices of Untimely Filing and Interview Waiver pilot from headquarters. However, each asylum office now independently identifies potential cancellation cases in their respective backlogs and offers interview waivers where appropriate.<sup>304</sup>

To ensure consistency and to further coordinate backlog reduction efforts, USCIS should make the AVC responsible for applying and refining the triage criteria. Also, as the AVC was created to centralize intake and case prescreening, USCIS could assign the AVC with case preparation responsibilities that extend beyond conducting security checks. To support these efforts, the AVC's staff should include: (1) country conditions experts to provide credible and objective country of origin information similar to RAIO's research unit,<sup>305</sup> (2) data scientists to ensure that the Asylum Division is identifying appropriate data trends, (3) FDNS staff to provide officers with actionable information related to any fraud concerns, and (4) substantive experts to conduct quality assurance and coordinate with both individual asylum offices and headquarters when issues arise.

#### Concerns and necessary considerations:

- There has been a lack of transparency and consultation with respect to the original intent of the AVC and its current operations. As such, providing triage and case preparation responsibilities to the AVC without proper consultation may raise concerns.

<sup>302</sup> *Id.*

<sup>303</sup> Information provided by USCIS (Mar. 10, 2022).

<sup>304</sup> *Id.*

<sup>305</sup> The AVC could model this unit after the Canadian Immigration and Refugee Board's Research Directorate, which includes substantive experts that provide national documentation packages and responses to information requests from adjudicators. For examples of the Research Directorate's work product, see Immigration and Refugee Board of Canada Web page, "Country of origin information" (Jul. 3, 2018); <https://irb-cisr.gc.ca/en/country-information/pages/index.aspx> (accessed May 17, 2022).

## IDENTIFYING NON-PRIORITY CASES

When creating different case processing tracks, USCIS should consider developing well-defined categories of pending asylum applications that are not an immediate priority. Non-priority cases could include those that are likely to be removed from the backlog before USCIS can adjudicate the asylum application and/or cases where inaction does not pose an immediate harm to the applicant. This may include applicants with alternative avenues for immigration (such as applicants with pending or approved immigrant visa petitions with immediate or upcoming visa availability) and applicants with underlying status that affords them protection from removal and provides work authorization (such as applicants with Temporary Protected Status (TPS)). Cases identified in triage that are manifestly in need of protection or eligible for a modified processing track should be excluded from non-priority consideration.

#### Concerns and necessary considerations:

- Asylum applicants with alternative avenues for immigration or underlying status may have immediate relatives abroad in harm's way, and delays in adjudicating their asylum application may have grave implications for these family members.
- Simply having an underlying status does not provide a path to lawful permanent residence and these applicants will most likely want to pursue asylum. Also, DHS may always decide to terminate certain temporary statuses, such as TPS, making these statuses a precarious factor for prioritization purposes.
- Although USCIS could establish a reliable method with transparent criteria for applicants with non-priority cases to request prioritization, current requests for expedited processing remain an obstacle for applicants.

## MODIFYING THE ASYLUM INTERVIEW

*The Need for Distinction Among Interviews.* The Asylum Division's current approach to scheduling interviews makes it challenging to reduce the backlog. Each office schedules its own interviews and generally does not consider case complexity when scheduling cases. Regardless of the issues involved, offices typically schedule each case for the same duration. Asylum officers currently conduct around 16 interviews every 2 weeks, which results in 2 interviews per day.<sup>306</sup> If asylum officers focused exclusively on the affirmative backlog and maintained this pace for the

<sup>306</sup> Information provided by USCIS (Mar. 16, 2022).

entire year, they could significantly reduce the backlog. However, due to the reasonable and credible fear screening workload, affirmative asylum adjudications remain a collateral duty at most asylum offices.<sup>307</sup> As this work may continue to outpace staffing increases, it appears necessary for the Asylum Division to modify its approach to interview scheduling.

With triaging, certain case processing tracks can use shortened interviews. USCIS could create a separate processing track for cases involving one-year filing deadline issues and schedule shortened interviews focused on this bar. Modifying interview scheduling for these cases would allow USCIS to schedule more interviews while still ensuring that applicants have an opportunity to establish that an exception applies.<sup>308</sup> USCIS should implement safeguards to ensure that the abbreviated interview is providing both applicants and officers with adequate time to articulate and explore potential exceptions.

The Asylum Division should also establish a reliable methodology for identifying case complexity. This would help to set expected interview lengths. USCIS employs a similar approach for naturalization applications, which allows for more effective interviews.<sup>309</sup> For the Asylum Division's methodology, certain case processing tracks may suggest the appropriate case complexity level. For example, if the Asylum Division establishes groups of cases where a presumption of eligibility applies, it could assign a low level of complexity to these cases. If individual background checks do not reveal any derogatory information, applicants in these groups could go to a truncated interview, allowing officers to complete more than 2 interviews per day. Alternatively, for cases involving a high degree of complexity, 1 interview per day may be more appropriate.

### Concerns and necessary considerations:

- Certain applicants, such as those that are unrepresented, may have a difficult time articulating an exception to the one-year filing deadline during a condensed interview.
- There is a perception among stakeholders that asylum officers frequently refer cases involving one-year filing deadline issues when an exception appears to apply. Truncating interviews risks compounding this perceived trend.

<sup>307</sup> *Id.*

<sup>308</sup> See INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. §§ 208.4(a)(2)(i)(B), 1208.4(a)(2)(i)(B).

<sup>309</sup> Field offices use an automated N-400 assessment to customize interview time slots. The N-400 assessment leverages ELIS' technology to review application data and other systems to identify factors that help inform the expected length of an interview. See CIS Ombudsman's Annual Report 2020, p. 20.

*The Potential Role of Interview Waivers.* To further increase interview capacity and help support the welfare of officers and applicants, the Asylum Division should also consider waiving the interview for certain cases, such as those with a low level of complexity. In 1997, INS removed language from the regulations that mandated asylum interviews for every case.<sup>310</sup> Furthermore, the Asylum Division already provides certain applicants the opportunity to waive their interview and proceed directly to immigration court. It should consider applying this approach to granting asylum cases as well, providing applicants with the opportunity to be interviewed if they so desire. Allowing officers to adjudicate claims without an interview could reduce levels of implicit bias, burnout, and secondary trauma. Also, waiving the interview for certain cases would significantly reduce the likelihood of triggering psychiatric symptoms among torture survivors.<sup>311</sup>

*The Necessity of Quality Assurance.* USCIS can couple efforts to increase interview capacity with robust quality assurance measures. Although USCIS has indicated that asylum interviews should generally last about an hour,<sup>312</sup> stakeholders continue to raise concerns regarding the excessive length of asylum interviews (i.e., interviews lasting several hours). In response, USCIS believes that lengthening interviews may be the result of having a relatively inexperienced officer corps, and that interviews will naturally improve as these officers gain more interview experience.<sup>313</sup> While this may be accurate, there are approximately 400 asylum officer vacancies,<sup>314</sup> and the division can endeavor to reduce growing pains

<sup>310</sup> Before the 1997 interim final rule, the regulation at 8 C.F.R. § 208.9(a) stated, in part, "For each application for asylum...an interview shall be conducted by an asylum officer..." 8 C.F.R. § 208.9(a)(1996). As part of the asylum reforms proposed in 1994, INS sought to change this regulation and make asylum interviews discretionary. However, the final rule ultimately retained the then "current mandate that all asylum applications who appear as scheduled will receive an interview with an asylum office." "Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization," 59 Fed. Reg. 62284, 62289 (Dec. 5, 1994). In 1997, an interim final rule amended this regulation to read, "The Service shall adjudicate the claim of each asylum applicant whose application is complete within the meaning of § 208.3(c)(3) and is within the jurisdiction of the Service." "Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures," 62 Fed. Reg. 10312, 10341 (Mar. 6, 1997). See also 8 C.F.R. § 208.9(a). Apart from a separate regulatory interview requirement for asylum cases involving bars (8 C.F.R. § 208.4(a)), there does not appear to be a categorical interview requirement for all asylum cases.

<sup>311</sup> USCIS Lesson Plan, "Interviewing Survivors of Torture and Other Severe Trauma" (Dec. 20, 2019); [https://www.uscis.gov/sites/default/files/document/foia/Interviewing\\_-\\_Survivors\\_of\\_Torture\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Survivors_of_Torture_LP_RAIO.pdf) (accessed Apr. 11, 2022).

<sup>312</sup> See USCIS Web page, "The Affirmative Asylum Process" (Mar. 15, 2022); <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process#:~:text=STEP%20FIVE%3A%20Interview&text=You%20must%20also%20bring%20your, vary%20depending%20on%20the%20case> (accessed Feb. 24, 2022).

<sup>313</sup> Information provided by USCIS (Mar. 16, 2022).

<sup>314</sup> Information provided by USCIS (Mar. 10, 2022).

for future hires. Currently, if a supervisor identifies that a particular officer's interviews are getting lengthier, they treat it as an individual issue and address it directly with the officer.<sup>315</sup> Addressing lengthening interviews as a systemic issue would be a broader and more effective solution, so the Asylum Division should seek to implement oversight from a headquarters level. This approach may allow the Asylum Division to identify specific trends that tend to unnecessarily lengthen interviews, such as officers applying an incorrect standard of proof or focusing on immaterial facts. The division could then use this information to inform future trainings and develop further performance expectations for officers regarding interview length.

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## SIMPLIFYING FINAL DECISIONS

Unless the Asylum Division alters how its officers finalize decisions, more interviews will not necessarily result in more case completions. As part of the 1995 asylum reforms, INS sought to simplify the decision-making process by no longer requiring asylum officers to write lengthy decisions citing all relevant case law and country of origin information.<sup>316</sup> Although the reforms largely abolished these time-consuming procedures,<sup>317</sup> the Asylum Division currently requires its officers to write lengthy assessments to explain the basis for their decisions.<sup>318</sup> These assessments, which are internal USCIS products that undergo supervisory review, do not comport with the 1995 reform efforts to create a more efficient process. While the pandemic has allowed the Asylum Division to catch up on its assessment writing, the number of cases

previously bottlenecked when the agency was interviewing at full capacity demonstrates the need for a more simplified approach.<sup>319</sup> Accordingly, USCIS should seek to modify how asylum officers finalize their decisions.

The decision-making process USCIS uses for other benefit requests should guide potential modifications for the Asylum Division. For example, officers adjudicating other significant immigration benefit requests, such as naturalization and adjustment of status, do not have to write lengthy assessments to justify approvals. In addition, officers use a checklist to finalize decisions for refugee adjudications and credible and reasonable fear screenings. These checklists help to ensure that the adjudicating officer has considered all necessary legal requirements without creating a protracted process for finalizing decisions.

The Asylum Division should implement a similar approach for finalizing asylum decisions. If triaging identifies a case as having no significant eligibility issues, officers could use a checklist before granting or referring a case. Through triage and case preparation, USCIS could tailor these checklists to specific case profiles. For more complex cases, these checklists could require a modified written assessment that focuses solely on the relevant issues, such as the impact of an inadmissibility concern or whether a novel particular social group is cognizable. As asylum officers already create a written record of the testimony and events that occur during an interview, any modifications made to the assessment writing process should reduce redundancies that simply repeat the officer's interview notes.

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## ADDITIONAL CONSIDERATIONS

*Implementing the Feedback Loop Between USCIS and the Immigration Court.* In attempting to reduce its backlog, USCIS should not substitute speed for accuracy. Inaccurate decisions not only threaten the integrity of the immigration system, but they also tend to unduly burden the immigration courts. Asylum applicants without lawful immigration status that are found ineligible by USCIS are placed in removal proceedings where an immigration judge can consider the applicants' asylum claims in a *de novo* hearing. Although applicants may present new evidence at their immigration court hearings, including oral testimony from expert witnesses, asylum hearings take place in an adversarial setting in the presence of an immigration

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<sup>315</sup> Information provided by USCIS (Mar. 16, 2022).

<sup>316</sup> See USCIS Lesson Plan, "Decision Writing Part I: Overview and Components" p. 5 (Dec. 14, 2017); [https://www.uscis.gov/sites/default/files/document/lesson-plans/Decision\\_Writing\\_I\\_Asylum\\_Lesson\\_Plan.pdf](https://www.uscis.gov/sites/default/files/document/lesson-plans/Decision_Writing_I_Asylum_Lesson_Plan.pdf) (accessed Feb. 24, 2022).

<sup>317</sup> "The INS will consider the recommendation that the letter state briefly the reasons why the application has not been granted. However, the INS believes that a regulatory standard mandating the contents of the referral letter is not necessary to preserve the procedural rights of applicants and may impede the flexibility that will be necessary to ensure that applicants receive their decisions in a prompt manner." "Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization," 59 Fed. Reg. 62284, 62294 (Dec. 5, 1994). See also David A. Martin, "Symposium, Making Asylum Policy: The 1994 Reforms," 70 Wash. L. Rev. 725, p. 750 (1995) ("If the officers are unable to grant, they no longer spend time preparing lengthy denial letters. Instead, they now check a box on a preprinted referral form that concisely indicates the general reasons for this disposition, and promptly refer the case on to immigration court.")

<sup>318</sup> The contents of assessments are divided into the following components: i. Biographic/Entry or Arrival/Immigration Status Information; ii. Basis of Claim; iii. Analysis of Prohibitions Against Filing for Asylum; iv. Summary of Testimony; v. Analysis of Credibility/Evidence Assessment; vi. Focused Legal Analysis; vii. Analysis of Bars/Discretionary Factors; and viii. Decision. See USCIS Lesson Plan, "Decision Writing Part I: Overview and Components" p. 9 (Dec. 14, 2017); [https://www.uscis.gov/sites/default/files/document/lesson-plans/Decision\\_Writing\\_I\\_Asylum\\_Lesson\\_Plan.pdf](https://www.uscis.gov/sites/default/files/document/lesson-plans/Decision_Writing_I_Asylum_Lesson_Plan.pdf) (accessed Feb. 24, 2022).

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<sup>319</sup> As of February 28, 2020, 24,290 cases were awaiting a decision post-interview. Information provided by USCIS (Mar. 10, 2022). From March to November 2020, the Asylum Division completed 20,000 cases, the majority of which were cases that had been interviewed prior to office closures. USCIS Response to the CIS Ombudsman's 2020 Annual Report (Dec. 4, 2020), p. 18.

judge and an opposing attorney from U.S. Immigration and Customs Enforcement (ICE). Despite the adversarial nature of these proceedings, most asylum cases referred from USCIS are ultimately granted by an immigration judge.<sup>320</sup> This ongoing trend appears to indicate that USCIS could grant more asylum cases in the first instance, thus reducing the immigration courts' workload.

The Asylum Division should consider conducting a study to identify the reasons for this disparity. The study could focus on cases referred for adverse credibility determinations, as it is commonly believed that immigration judges often reach a different conclusion during proceedings. The Asylum Division could also conduct a pilot for a specific asylum office, focusing on cases that are referred to immigration court. Before filing an NTA with the immigration court, it can work with ICE's Office of the Principal Legal Advisor (OPLA) to identify cases that are unnecessarily referred, and USCIS can modify its decision accordingly. USCIS can use the results of its own study and the information received from OPLA to improve quality assurance and training. USCIS could also periodically compare grant rates between the immigration courts and the Asylum Division for certain nationalities and seek to more closely align any incongruities in outcomes.<sup>321</sup> These efforts will help to preserve immigration court resources and improve the accuracy of the Asylum Division's decisions.

*Targeting Protection Screening Efforts.* The backlog in affirmative asylum applications continues to be the consequence of the Asylum Division's credible and reasonable fear screening workloads. These workloads are often difficult to predict, tend to fluctuate dramatically, and require the Asylum Division to divert staff that would otherwise be assigned to the affirmative asylum caseload. Although the Asylum Division created a processing center to deal primarily with these screenings, asylum offices continue to attend to this workload at the expense of their

affirmative asylum backlogs. In addition, the growth in alternatives to immigration detention<sup>322</sup> present some logistical challenges for the credible fear workload. A more selective and discretionary approach to credible fear screenings would more effectively allocate resources.

Based on decision outcomes, the value of the credible fear screening is questionable. From FYs 2016 to 2020, approximately 83 percent of the nearly 357,000 individuals screened received a positive credible fear determination.<sup>323</sup> During this same time period, the Executive Office for Immigration Review (EOIR) vacated approximately 26 percent of USCIS' negative credible fear determinations.<sup>324</sup> In its new interim final rule, DHS provided USCIS with the discretion to place individuals referred for credible fear screenings directly into proceedings under INA section 240 without making a credible fear determination.<sup>325</sup> USCIS should leverage this regulatory authority to triage credible fear claims referred to the agency for interview. This approach should be data-driven, recognizing that interviewing certain populations who rarely, if ever, have a negative credible fear determination is not an effective use of USCIS' resources. A more selective process could also reduce the physical office space needed to decrease the Asylum Division's growing non-detained credible fear backlog.

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## MOVING FORWARD: ENGAGING AND COMMITTING TO BACKLOG REDUCTION

To help ensure the success of any backlog reduction efforts, USCIS must solicit continuous feedback from stakeholders. This will allow the agency to refine any processing modifications and serve as another important quality assurance mechanism. For an open and informed dialogue to occur, USCIS must be more transparent about the makeup of the current backlog and decision outcomes at each of its offices. It would also help USCIS to be forthcoming about any processing challenges, technological limitations, potential abuses in the system, and current pilots underway. The CIS Ombudsman has firsthand knowledge of the ingenuity and fresh ideas

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<sup>320</sup> In FYs 2016 to 2021, approximately 73 percent of the affirmative asylum claims that the immigration courts adjudicated were ultimately granted asylum. CIS Ombudsman's calculation based on data available on Transactional Records Access Clearinghouse Web page, "Asylum Decisions" (data referenced on Apr. 7, 2022); <https://trac.syr.edu/phptools/immigration/asylum/> (accessed Apr. 11, 2022). See also Human Rights First, Protection Postponed: Asylum Office Backlogs Cause Suffering, Separate Families, and Undermine Integration (Apr. 9, 2021); [https://www.humanrightsfirst.org/sites/default/files/Protection\\_Postponed.pdf](https://www.humanrightsfirst.org/sites/default/files/Protection_Postponed.pdf) (accessed Apr. 11, 2022).

<sup>321</sup> Currently, stakeholders cannot make such comparisons because, although EOIR releases asylum decision rates by nationality, USCIS' Asylum Division does not publicly release granular data on adjudicated cases. In addition, EOIR previously released Statistics Yearbooks each FY that clearly reflected EOIR's grant rates for affirmative asylum claims referred from USCIS. Beginning in FY 2017, EOIR modified the format of its Statistics Yearbook, which made it difficult to interpret its grant rates for affirmative asylum claims. In addition, EOIR has not released a Statistics Yearbook since FY 2018. This overall lack of transparency prohibits stakeholders from seeking accountability when significant disparities occur.

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<sup>322</sup> See Eileen Sullivan, "Biden to Ask Congress for 9,000 Fewer Immigration Detention Beds," *The New York Times* (Mar. 25, 2022), <https://www.nytimes.com/2022/03/25/us/politics/biden-immigration-detention-beds.html> (accessed Apr. 28, 2022).

<sup>323</sup> See "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," 87 Fed. Reg. 18078, 18200 (Mar. 29, 2022).

<sup>324</sup> CIS Ombudsman's calculation based on data available on EOIR's website, "Credible Fear Review and Reasonable Fear Review Decisions" (Jan. 19, 2022); <https://www.justice.gov/eoir/page/file/1104856/download> (accessed Apr. 11, 2022).

<sup>325</sup> 8 C.F.R. § 208.30(b).

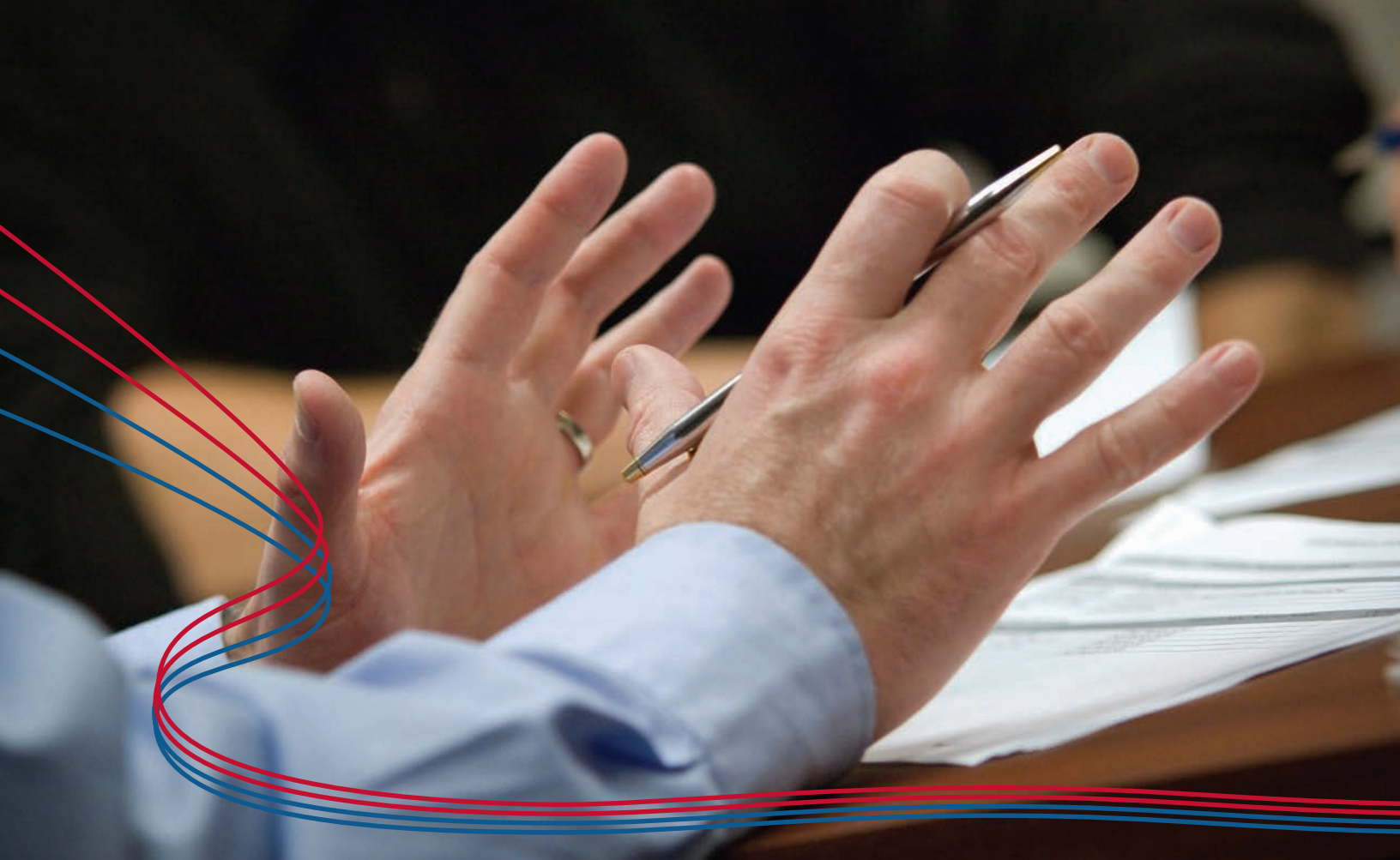
that stakeholders can offer. USCIS could significantly benefit from a closer collaboration with stakeholders and consensus building will only help to further increase efficiencies.

As the Asylum Division expands and additional congressional funding may be on the horizon,<sup>326</sup> it appears that the asylum backlog has reached an inflection point. Without bold action and fundamental changes to the Asylum Division’s current processes, the backlog will likely continue to grow. The CIS Ombudsman encourages USCIS to take this unique opportunity to rise to the challenge and chart a new path forward.

<sup>326</sup> President Biden’s proposed FY 2023 budget provides \$765 million for USCIS to efficiently process increasing asylum caseloads, address the immigration application backlog, and improve refugee processing. See Budget of the U.S. Government FY 2023; [https://www.whitehouse.gov/wp-content/uploads/2022/03/budget\\_fy2023.pdf](https://www.whitehouse.gov/wp-content/uploads/2022/03/budget_fy2023.pdf) (accessed Apr. 11, 2022). See also “United States Citizenship and Immigration Services FY 2023 Budget Request” before the Subcommittee on Homeland Security of the House of Representatives Comm. on Appropriations, 117th Cong. 2nd Sess. (2022) (written testimony of Ur M. Jaddou, Director of USCIS); <http://docs.house.gov/meetings/AP/AP15/20220406/114604/HHRG-117-AP15-20220406-SD001.pdf> (accessed Apr. 11, 2022).







# ELIMINATING BARRIERS TO OBTAINING PROOF OF EMPLOYMENT AUTHORIZATION FOR ASYLUM APPLICANTS IN REMOVAL PROCEEDINGS

## RESPONSIBLE DIRECTORATES

Service Center Operations and Field Operations

## INTRODUCTION

U.S. law requires U.S. Citizenship and Immigration Services (USCIS) to “immediately” issue a biometrically-enabled employment authorization document (EAD) once a person is granted asylum.<sup>327</sup> Despite this, some asylum grantees still encounter barriers obtaining proof of their employment authorization. People with asylum applications that have been pending for more than 180 days—the current required amount of time—experience similar barriers to obtaining an EAD, despite their eligibility. These barriers arise in part because the asylum process is split between USCIS and the Department of Justice’s (DOJ’s) Executive Office for Immigration Review (EOIR), with each agency having different powers in the process.<sup>328</sup>

<sup>327</sup> 8 U.S.C. § 1738.

<sup>328</sup> USCIS has authority to grant employment authorization and issue EADs, as well as issue a Form I-94, *Arrival/Departure Record*, as proof of asylum status in the United States. See 8 C.F.R. § 274a.13 and 11 USCIS Policy Manual, Pt. F, Ch. 1(A), fn 1; <https://www.uscis.gov/policy-manual/volume-11-part-f-chapter-1> (accessed May 26, 2022).

Individuals seeking asylum generally fall into two groups:

- Affirmative asylum applicants are individuals who are not in removal proceedings and are seeking asylum. For these applicants, the affirmative asylum adjudication process—from filing Form I-589, *Application for Asylum and for Withholding of Removal*, to receiving an EAD and proof of asylee status—takes place with USCIS. Therefore, USCIS does not rely on EOIR.
- Defensive asylum applicants are individuals in removal proceedings who are seeking asylum. EOIR has jurisdiction over these applicants, and an EOIR immigration judge (IJ) grants asylum to them. They must also apply to USCIS—which has no record of its own of the asylum grant—for an EAD and a Form I-94 demonstrating the grant of asylum, providing the asylee evidence of their status.

Defensive asylum applicants face more substantial barriers in obtaining EADs and proof of their asylee status. In both scenarios, they must appeal to an agency that must coordinate with another department; they must navigate between those two distinct departments during their asylum process.

USCIS often denies EAD applications from qualified defensive asylum applicants because it is unable to find evidence of their pending Form I-589 in its or EOIR systems, which results in applicants having to submit multiple filings and endure delays while attempting to resolve the issue. Those granted asylum by an IJ are instructed to call the USCIS Contact Center to request an appointment at their local USCIS field office to obtain a Form I-94. However, COVID-19 pandemic measures, contract cuts, and other measures taken by USCIS in response to its financial challenges have left certain functions, particularly in customer service, more difficult to access, frustrating applicants seeking appointments.<sup>329</sup> Individuals are often unable to get through to someone who can assist them at Tier I, or they get through only to be told there are no available appointments. Even if the asylee can obtain one of the available appointments, administrative and file transfer delays often mean USCIS officers cannot issue the Form I-94 because they cannot confirm the asylee's status. Without status documentation, asylees are unable to demonstrate employment authorization for Form I-9 employment verification purposes.

To reduce these barriers, the CIS Ombudsman recommends USCIS work to expeditiously provide crucial status and employment authorization documents to defensive asylum applicants. The CIS Ombudsman has identified gaps between USCIS and EOIR communications as barriers that can prevent defensive asylum applicants from accessing benefits for which they qualify in a timely manner. By improving connections with EOIR, USCIS can decrease delays in processing EADs and proof of asylee status requests from defensive asylum applicants.

## RECOMMENDATIONS

To improve coordination between these partners in the asylum process, we recommend USCIS consider the following:

1. Provide guidance to officers on how to contact EOIR to resolve discrepancies between documents submitted with a Form I-765, *Application for Employment Authorization*, and data pulled from EOIR systems related to asylum applicants in removal proceedings.
2. Leverage information sharing and IT systems to simplify the process of creating EADs and Forms I-94.
3. Designate the IJ order granting asylum as acceptable evidence for Form I-9 employment verification purposes.
4. Consider a pilot program which places USCIS immigration services officers who have the authority to provide USCIS documents in certain immigration courts to new asylees.

## BACKGROUND

*Individuals must be authorized to be employed in the United States.* Under section 274A of the Immigration and Nationality Act (INA), it is unlawful to hire, continue to employ, recruit, or refer for a fee an individual who is not authorized for employment in the United States. All employees must be authorized for employment and, with few exceptions, provide proof of eligibility to be employed.<sup>330</sup> Employers who violate this requirement may be subject to sanctions and criminal penalties.

<sup>330</sup> See INA § 274A, 8 U.S.C. § 1324a. Individuals who are self-employed, independent contractors, or in a casual or one-time employment situation are not required to show proof of employment authorization. See 8 C.F.R. § 274a.1(f)(defining “employee”).

<sup>329</sup> CIS Ombudsman's Annual Report 2021, p. 11.

There are two types of asylum-related employment authorization:

- People granted asylee status are eligible for employment incident to their status (also referred to as the (a)(5) employment authorization category) and must receive an EAD immediately upon being granted asylum.<sup>331</sup> The law does not require asylees to separately apply for an EAD from USCIS, as their I-94 evidences both their status and their work authorization, but many wish to obtain one as a biometrically-enabled identity document.
- Generally, individuals with asylum applications pending more than 180 days are eligible for employment authorization (also referred to as the (c)(8) employment authorization category).<sup>332</sup> To obtain an EAD, they must submit a completed Form I-765 to USCIS and show they are eligible under the (c)(8) category.

Under current procedures, USCIS will accept Form I-765 from an asylum applicant 150 days after the filing of the asylum application. However, USCIS will not grant employment authorization before 180 days from the date an asylum application was filed. The running calculation of this 180-day period has been referred to by different names but is most commonly called the “EAD Clock.”<sup>333</sup> USCIS officers at service centers adjudicate Forms I-765 by reviewing EAD Clock information in various USCIS and EOIR databases. Applicants cannot appeal a USCIS decision to deny a Form I-765.

*Applying for asylum with USCIS or EOIR.* To qualify for a category (c)(8) EAD, applicants must have filed Form I-589 either with USCIS or EOIR.<sup>334</sup> Generally, applicants who are not in immigration court proceedings file their

Form I-589 with USCIS. This filing is referred to as an affirmative asylum application. Information from these asylum filings is entered into USCIS’ case management system, referred to as Global, which permits digitization of certain processing steps but not end-to-end (paperless) electronic processing.<sup>335</sup> Affirmative asylum applicants receive receipt notices indicating the receipt number and date of filing, along with other information.

If USCIS does not approve the affirmative asylum application and the applicant does not have legal status in the United States, then USCIS will issue a Notice to Appear (NTA) before the immigration court and file the NTA with EOIR. Jurisdiction of the case then transfers to EOIR for removal proceedings under section 240 of the INA.<sup>336</sup>

Applicants in removal proceedings may file asylum applications with EOIR as a defense against removal from the United States.<sup>337</sup> They can file the application either with the IJ during a hearing or with the immigration court outside of a hearing by mail, at the immigration court window, or online.<sup>338</sup> An attorney or accredited representative can file an asylum application online through the EOIR Courts and Appeals System (ECAS) case portal or via email. Paper filings are manually entered in ECAS by court staff who scan the paper application and supporting documents to create a PDF, then save the PDF and upload it into ECAS.<sup>339</sup> EOIR does not issue receipt notices, but an applicant can have the court stamp the date of receipt on a copy of the originally filed application, or retrieve a PDF version of the application from the ECAS portal that has a watermark indicating the filing date and time.<sup>340</sup>

An IJ cannot grant asylum until USCIS has completed background checks for the applicant.<sup>341</sup> To initiate these background checks, applicants must submit a copy of the

<sup>331</sup> See C.F.R. § 274a.12(a)(5); see also Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173, Title III, § 309 (May 14, 2002).

<sup>332</sup> INA § 208(d)(2); 8 U.S.C. § 1158(d)(2) and 8 C.F.R. §§ 208.7(a)(1) and 274a(c)(8)(i) (2019). Under 8 C.F.R. § 208.7(a)(1)(ii) (2020), an applicant was eligible for a category (c)(8) EAD 365 calendar days after the receipt date for Form I-589. However, on February 7, 2022, the U.S. District Court for the District of Columbia, in the case *Asylumworks v. Mayorkas*, 20-cv-3815 (BAH) (D.D.C. Feb. 7, 2022), vacated the June 26, 2020, final rule (“Asylum Application, Interview, and Employment Authorization for Applicants Rule”). To comply with the order, USCIS stopped applying the 365-day requirement and returned to applying the provisions of 8 C.F.R. § 208 and 274a that were in place before the June 2020 final rule took effect. See USCIS Web page, “I-765, Application for Employment Authorization” (Mar. 3, 2022); <https://www.uscis.gov/i-765> (accessed Mar. 4, 2022).

<sup>333</sup> EOIR Internal Memorandum, “Asylum Processing” (Dec. 4, 2020); <https://www.justice.gov/eoir/page/file/1343191/download> (accessed Apr. 1, 2022) and 85 Fed. Reg. 38532, “Asylum Application, Interview, and Employment Authorization for Applicants” (Jun. 26, 2020). The “Asylum Clock” is distinct from the EAD 180-day requirement. This reference reflects section 208(d)(5)(A)(iii) of the INA, which states that EOIR is expected to adjudicate asylum applications within 180 days absent exceptional circumstances.”

<sup>334</sup> USCIS Web page, “Obtaining Asylum in the United States” (Sep. 16, 2021); <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states> (accessed Mar. 4, 2022).

<sup>335</sup> DHS Office of Inspector General Report, “Continued Reliance on Manual Processing Slowed USCIS’ Benefits Delivery during the COVID-19 Pandemic,” OIG-22-12 (Dec. 28, 2021), p. 11; <https://www.oig.dhs.gov/sites/default/files/assets/2022-01/OIG-22-12-Dec21.pdf> (accessed Apr. 19, 2022).

<sup>336</sup> 8 C.F.R. § 208.14(c)(1).

<sup>337</sup> An exception is made for unaccompanied minors; USCIS has jurisdiction over their asylum applications whether or not they are in removal proceedings. See 8 INA § 208(b)(3)(C); 8 U.S.C. § 1158(b)(3)(C).

<sup>338</sup> EOIR Interoffice Memorandum, “Asylum Processing,” p. 2 (Dec. 4, 2020); <https://www.justice.gov/eoir/page/file/1343191/download> (accessed Apr. 21, 2022). See also EOIR Interoffice Memorandum, “Cancellation of Certain Operating Policies and Procedures Memoranda” (Nov. 6, 2020); <https://www.justice.gov/eoir/page/file/1335101/download> (accessed Apr. 21, 2022) (Since EOIR allows the filing of asylum applications by mail, at the window, or through ECAS, rather than at a master calendar hearing, the practice of “lodging” an application is no longer needed).

<sup>339</sup> Information provided by EOIR (May 11, 2022).

<sup>340</sup> *Id.*

<sup>341</sup> 8 C.F.R. § 1003.47.

first three pages of their Form I-589 filed with EOIR to the Nebraska Service Center. USCIS will mail the applicant a receipt notice indicating it has received the asylum application and a biometrics appointment notice.<sup>342</sup>

*Sharing information between USCIS and EOIR.* EOIR's Case Access System for EOIR (CASE) tracks immigration court cases and manages information, among other services. USCIS and EOIR entered into a Memorandum of Agreement (MOA) in October 2012 to exchange data "to support their respective missions including: immigration status verification, immigration investigation, appropriate immigration enforcement, and immigration processing and adjudication."<sup>343</sup> CASE contains data for asylum applications either referred by USCIS to EOIR or for asylum applications first filed with EOIR.<sup>344</sup> This data includes the date the asylum application was filed (whether affirmatively or defensively), court hearing adjournment codes subsequently entered by the IJ, and other information, and is transmitted upon request to USCIS' Person Centric Query Service (PCQS)-DOJ-EOIR and Global system by the Immigration Review Information Exchange System (IRIES) feed.<sup>345</sup> USCIS uses the CASE data to adjudicate asylum employment authorization applications, determine jurisdictional issues, conduct security checks, and perform other procedures as part of USCIS adjudications.<sup>346</sup> Under the agreement, USCIS and EOIR will assist each other with data and technical problems, notify each other upon discovering errors in their own or the other's respective data, and notify and update each other every year of the points of contact for this purpose.<sup>347</sup>

USCIS' Asylum Division takes the lead in collaborating with EOIR to resolve EAD Clock issues. USCIS has a working group with representatives from the Asylum Division, Service Center Operations Directorate, Office of Chief Counsel, and Office of Information Technology (OIT) that meets biweekly and troubleshoots clock data

issues and EAD asylum concerns.<sup>348</sup> Currently, the working group is devoting itself to coordinating with EOIR and its transition to its new case management system, potentially updating the MOA between DHS/USCIS and DOJ/EOIR, and developing a protocol to address future data irregularities resulting from the transition to the new case management system.<sup>349</sup>

To help USCIS adjudicate Forms I-765 based on a pending asylum application, EOIR maintains an EAD Clock in its case management system.<sup>350</sup> USCIS uses this data to calculate the 180-day EAD Clock for pending asylum application-based EAD adjudications. EOIR starts the clock on the date USCIS or EOIR accepts Form I-589, and the clock runs continuously, except during any delay caused by the applicant.<sup>351</sup> EOIR maintains the EAD Clock "solely as a convenience for USCIS."<sup>352</sup> If an asylum applicant believes their EAD Clock information is incorrect, they must contact EOIR and follow up with USCIS if the issue has not been resolved by EOIR.

### Asylum Applicants Face Challenges with Verifying and Correcting EAD Clock Information

To be eligible for a (c)(8) EAD, applicants must provide evidence of a filed Form I-589 when they file Form I-765 with USCIS. USCIS must consider all evidence submitted with a benefit request.<sup>353</sup> Acceptable evidence of proof of a filed Form I-589 with EOIR includes a copy of the acknowledgement of receipt of the filed Form I-589 application, a copy of the Form I-589 filed with the immigration court, EOIR filing fee receipts, IJ decisions or orders, docket scheduling documents, and affidavits with information that can be cross-referenced in the USCIS systems.<sup>354</sup> USCIS considers evidence showing a complete asylum application has been filed with the immigration court and weighs it against the data in PCQS.<sup>355</sup>

USCIS has denied Forms I-765 when it cannot find evidence of a filed Form I-589 in USCIS and EOIR electronic records. Although USCIS states that it considers a copy of the acknowledgement of receipt of the filed Form I-589 application and a copy of the filed Form I-589 with the EOIR court to be primary evidence of a

<sup>342</sup> See USCIS Web page, "Immigration Benefits in EOIR Removal Proceedings" (Aug. 5, 2020); <https://www.uscis.gov/laws-and-policy/other-resources/immigration-benefits-in-eoir-removal-proceedings> (accessed Apr. 19, 2022).

<sup>343</sup> "Memorandum of Agreement between the Department of Homeland Security and the Department of Justice, Executive Office for Immigration Review regarding The Sharing of Information on Immigration Cases" (Oct. 2012); <https://www.justice.gov/sites/default/files/eoir/legacy/2014/11/20/DHS-MOA-Data-Agreement.pdf> (accessed Mar. 31, 2022).

<sup>344</sup> Information provided by USCIS (Apr. 6, 2022).

<sup>345</sup> Information provided by USCIS (Apr. 6, 2022) and EOIR (May 11, 2022).

<sup>346</sup> Information provided by USCIS (Apr. 6, 2022).

<sup>347</sup> "Memorandum of Agreement between the Department of Homeland Security and the Department of Justice, Executive Office for Immigration Review regarding The Sharing of Information on Immigration Cases," p. 5 (Oct. 2012); <https://www.justice.gov/sites/default/files/eoir/legacy/2014/11/20/DHS-MOA-Data-Agreement.pdf> (accessed Mar. 31, 2022).

<sup>348</sup> Information provided by USCIS (Apr. 6, 2022).

<sup>349</sup> *Id.*

<sup>350</sup> EOIR Interoffice Memorandum, "Asylum Processing," p. 5 (Dec. 4, 2020); <https://www.justice.gov/eoir/page/file/1343191/download> (accessed Apr. 21, 2022).

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> 1 USCIS Policy Manual, Pt. E, Ch. 6; <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6> (accessed Apr. 21, 2022).

<sup>354</sup> Information provided by USCIS (Apr. 6, 2022).

<sup>355</sup> *Id.*

filed Form I-589,<sup>356</sup> USCIS has still denied Forms I-765 when the applicant submitted these documents.<sup>357</sup> The denial notices have stated that the evidence on record, including information in EOIR's systems, failed to indicate that the applicants filed an asylum application. The decisions do not explain why the applicants' copy of Forms I-589 stamped as received by EOIR, if provided, were insufficient.

Frequently, asylum applicants discover errors in the EAD Clock only when USCIS denies their Form I-765. Applicants can confirm the status of their EAD Clocks by calling the EOIR Immigration Court Assistance telephone number or, in some cases, the immigration court having jurisdiction over their case.<sup>358</sup> Having applicants confirm with EOIR that it has received their asylum application would be efficient. However, stakeholders have raised issues about trying to get filing status updates and jurisdictional questions answered by EOIR due to court staff not answering phones or not having guidance. Stakeholders have also mentioned issues with EOIR providing inconsistent guidance on how to determine whether they qualify for an EAD and whether their information in EOIR systems is current and accurate.<sup>359</sup>

*Requests for Case Assistance on Establishing Eligibility for a (c)(8) EAD.* The CIS Ombudsman has received requests for case assistance from asylum applicants whose forms were denied based on an incorrect finding that the applicants did not have pending Forms I-589 and for other EAD Clock-related issues. In some of these cases, data for the Form I-589 was not available in either the USCIS or EOIR electronic systems. Some of these applicants received denial notices even though they had submitted a copy of the immigration court-stamped asylum applications and a copy of the notice of a future court appearance date with their Form I-765.

*A Guatemalan national filed his Form I-589 with an IJ in August 2019 and received a copy of the form with the date of receipt and IJ's initials on it. The IJ also issued a notice indicating the defensive asylum applicant's next immigration court hearing date. In December 2020, the applicant filed Form I-765, along with a copy of the filed Form I-589 and hearing notice, requesting a (c)(8) EAD. In June 2021, USCIS denied the Form I-765 after finding no record*

*in his file and USCIS and EOIR records indicating the applicant had filed a Form I-589. Subsequently, the applicant's legal representative learned from the immigration court clerk that the applicant's Form I-589 was filed but had not been entered into EOIR's electronic system. The clerk entered the filing in the system in October 2021 (more than 2 years after the IJ received the Form I-589). The applicant filed another Form I-765 in December 2021, which was still pending as of May 2022.*<sup>360</sup>

Applicants have also experienced difficulties in establishing a pending Form I-589 when USCIS has served an NTA on the applicants but has not yet filed it with EOIR.<sup>361</sup> Because they are not yet in EOIR's system, they are instructed to file their Form I-589 with USCIS.<sup>362</sup> After they file the asylum applications with USCIS, the agency denies their applications for employment authorization because there is no electronic record that they filed Form I-589 with EOIR.

The same issue arises when the asylum applicant is an unaccompanied noncitizen child. USCIS has jurisdiction over asylum applications filed by unaccompanied noncitizen children, even if they are in removal proceedings.<sup>363</sup> However, the agency has denied applications for employment authorization because there was no record that the unaccompanied noncitizen child filed a Form I-589 with EOIR, even though it is supposed to be and had been filed with USCIS.

*I have filed for my work permit three times. I entered the U[nited] S[tates] as an unaccompanied minor. and filed for asylum as an unaccompanied minor. USCIS currently has jurisdiction over my timely filed asylum application, it has not been referred to the Court. My EAD [application] keeps getting denied because I have not filed for asylum with the [immigration] court. I have submitted cover letters/requests for review, etc. but the response remains that my EAD cannot be granted until my asylum application is filed with the court. This is clear error.*<sup>364</sup>

In response to some CIS Ombudsman inquiries in these situations, USCIS reopened the applications and approved

<sup>356</sup> *Id.*

<sup>357</sup> Information provided by stakeholders (Apr. 18, 2022, and Sept. 13, 2021) and through request for case assistance.

<sup>358</sup> The telephone assistance line does not provide information for applicants with cases designated as confidential by EOIR; these applicants must call the immigration court instead. Information provided by EOIR (May 11, 2022).

<sup>359</sup> Information provided by stakeholders (Feb. 24, 2022).

<sup>360</sup> Information through request for case assistance.

<sup>361</sup> *Id.*

<sup>362</sup> USCIS Web page, "I-589, Application for Asylum and for Withholding of Removal" (Mar. 3, 2022); <https://www.uscis.gov/i-589> (accessed Mar. 4, 2022).

<sup>363</sup> USCIS Interoffice Memorandum, "Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children" (May 28, 2013); <https://www.uscis.gov/sites/default/files/document/memos/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf> (accessed Mar. 4, 2022).

<sup>364</sup> Information provided by stakeholder seeking assistance.

the EADs. In others, it stood by its decisions. The CIS Ombudsman’s ability to assist these applicants is limited because it cannot assist with matters that fall under EOIR.

*Form I-589 Filing Date and Jurisdiction Confusion Worsens Lengthy Processing Times.* The need to resolve an EAD Clock problem to even file a request for an EAD exacerbates the adverse effects that lengthy processing times have on applicants. When USCIS eliminated its regulatory goal of processing initial asylum EAD requests within 30 days, asylum applicants experienced increased delays in their EAD applications.<sup>365</sup> The average processing time for Form I-765 based on a pending asylum application was 7.1 months as of January 31, 2022, over 4 times longer than the processing time of 1.7 months in FY 2017.<sup>366</sup> For defensive asylum applicants, inserting USCIS in the process of obtaining an EAD compounds the challenges they already face when seeking to support themselves and their families. EAD Clock errors related to the sharing of information and parsing of jurisdiction between USCIS and EOIR increases the chances of an incorrect denial resulting in periods of financial uncertainty and unnecessary hardship. Unable to work, many applicants are left without access to financial resources to support themselves and their families.

## Two-Agency Process Creates Delays in EAD and Form I-94 Issuance

Once applicants receive asylum status, they are authorized to work incident to that status and are not required to have an EAD as proof of employment authorization. They can be self-employed, independent contractors, or in a casual or one-time employment situation without having to show proof of employment authorization.<sup>367</sup> However, like all potential employees, asylees must present proof of identification and employment authorization to their employers for I-9 employment verification purposes. An EAD is a List A document (establishing both identity and employment authorization), and a Form I-94 endorsed for employment, which they are entitled to as proof of their status, is a List C document (establishing employment authorization). Obtaining an EAD and Form I-94 is where USCIS delays become barriers for defensive asylees.

Individuals granted asylum by USCIS receive their decision either in person or in the mail, along with a completed Form I-94 indicating that they have been granted asylum in the United States. That Form I-94 with its asylee status indication is sufficient to demonstrate work authorization. However, they must file separately for an EAD if they desire one, which many do, because it can serve as both an identity and work authorization document.<sup>368</sup> Still others apply because they encounter employers who insist, despite the I-94, that the noncitizen must provide an EAD as proof of employment eligibility. Despite the statute’s mandate that the asylee must “immediately” be given an EAD, these applications are subject to lengthy processing times.<sup>369</sup>

Individuals granted asylum by an IJ must also file separately for an EAD. They also face the additional burden of not receiving proof of their status in the United States sufficient for employment authorization. IJs do not issue a Form I-94 with an order granting asylum, and IJ orders are not acceptable for Form I-9 employment verification purposes “because they are not issued by DHS.”<sup>370</sup> Instead, IJs provide new asylees with instructions to call the USCIS Contact Center to request an in-person appointment to obtain a Form I-94 at the local field office at least 3 business days after an IJ’s order granting asylum

<sup>368</sup> 8 C.F.R. § 274a.12(a)(5). An EAD held by an asylum applicant under category (c)(8) “expire[s] on a specified date.” 8 C.F.R. § 247a.12(c)(8)(i).

<sup>369</sup> USCIS Web page, “Types of Asylum Decisions” (Jan. 26, 2021); <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/types-of-asylum-decisions> (accessed Mar. 4, 2022). As of mid-May, 2022, the posted processing times for these EADs are 10 months (Nebraska Service Center) and 15 months (Texas Service Center). USCIS Web page, “Check Case Processing Times;” <https://egov.uscis.gov/processing-times/> (accessed May 14, 2022).

<sup>370</sup> USCIS Handbook for Employers, M-274 § 6.3 (Nov. 24, 2020); <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274> (accessed Mar. 7, 2022). Stakeholders have informed the CIS Ombudsman that some employers mistakenly insist on an EAD as proof of employment authorization. Requiring a noncitizen to produce another document (i.e., an EAD) when an initial combination of documents (i.e., List B and List C documents) appear to be genuine and sufficient to meet the requirements of establishing identity and employment authorization is an unfair immigration-related employment practice. See INA § 274A(b)(1)(A), 8 U.S.C. § 1324a(b)(1)(A) and USCIS Handbook for Employers, M-274 10.1.1 (Nov. 24, 2020); <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274> (accessed Mar. 7, 2022); see also DOJ Web page, “Immigration and Employee Rights Section” <https://www.justice.gov/crt/immigrant-and-employee-rights-section> (accessed Mar. 4, 2022). The Immigrant and Employee Rights (IER) Section in DOJ’s Civil Rights Division enforces the anti-discrimination provision of the INA. IER also has a worker hotline for individuals who feel they have suffered one of the statutory forms of discrimination and an Employer Hotline for employers with questions about the anti-discrimination provision of the INA. Employers are not expected to be experts on documents, but they are expected to accept documents that reasonably appear to be genuine and to relate to the person presenting them. USCIS Handbook for Employers, M-274 § 12.0 (Nov. 24, 2020); <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274> (accessed Mar. 7, 2022). In a tangential issue, stakeholders have also noted that some Departments of Motor Vehicles also require an applicant to produce an EAD to establish eligibility for a driver’s license.

<sup>365</sup> “Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications,” 85 Fed. Reg. 37502 (Jun. 22, 2020). A district court judge preliminarily enjoined enforcement of this final rule against class members of the Asylum Seekers Advocacy Project and Casa de Maryland. *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928 (D. Md. 2020).

<sup>366</sup> USCIS Web page, “Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year” (FY 2017 to 2022 (up to January 31, 2022)); <https://egov.uscis.gov/processing-times/historic-pt> (accessed Mar. 4, 2022).

<sup>367</sup> 8 C.F.R. § 274a.1(f).

is final.<sup>371</sup> An IJ's order is final when the opposing party waives its right to appeal or does not file an appeal within 30 days of the date of the order, whichever comes first. The delay allows time for the file to be transferred to USCIS before the scheduled appointment. The government often waives its right to appeal in cases that are not considered a priority, where there is little likelihood of success on appeal, in the interest of judicial efficiency, and due to limited resources.<sup>372</sup> The same waiting periods apply before the new asylee may file a Form I-765 to request an (a)(5) EAD as well.

The CIS Ombudsman has addressed in previous Annual Reports the challenges individuals and their legal representatives have faced when trying to speak to someone at the Contact Center to request an in-person appointment at a field office. Although USCIS has sought to improve its customer service, stakeholders continue to share with the CIS Ombudsman the challenges that remain.<sup>373</sup> Moreover, even when an asylee does secure an appointment, file transfer delays may prevent them from getting the Form I-94 to which they are entitled. If the file is not available at the time of the appointment, USCIS officers have delayed issuing the Form I-94 until receipt of the file and confirmation of asylee status. This leads to repeated appointments and additional frustration for asylees.<sup>374</sup>

Further delays exacerbate the adjudication of the EAD for asylees. If government counsel does not waive its right to appeal an IJ order, defensive asylees must wait 30 days after their grant of asylum before submitting Form I-765, to avoid applying for work authorization in a category to which they are not yet entitled. Once the form is submitted, the asylee has to wait another 10 to 15 months (as noted above, the current processing times for Form I-765 in the (a)(5) category) for USCIS to adjudicate the form.<sup>375</sup> These delays severely misalign with the urgency contemplated by the statute and impede asylees' ability to access needed benefits for which they are eligible, such as time-limited cash assistance and services offered through the Office of

Refugee Resettlement.<sup>376</sup> Delays in obtaining a Form I-94 or EAD could result in defensive asylees not being able to access needed benefits to the full extent permitted, if at all.

*The asylee EAD or Form I-94 process adds to USCIS backlogs.* Asylee EADs represent a small number of EAD applications but a large burden on EAD backlogs and processing times, as well as on the Contact Center and InfoMod appointment system. IJs granted asylum to 18,851 individuals in FY 2019, the last fiscal year completed before the COVID-19 pandemic and granted asylum to 14,548 individuals in the first quarter of FY 2022, which is the same number that were granted in all of FY 2020, when many courts were shuttered for months.<sup>377</sup> In FY 2021, the Contact Center scheduled 211,000 in-person appointments,<sup>378</sup> with 13,882 (almost 7 percent) of these appointments scheduled to obtain proof of status granted by an IJ.<sup>379</sup>

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## RECOMMENDATIONS

The CIS Ombudsman has identified actions USCIS can take to reduce barriers that may impede access to immigration and other benefits for individuals seeking asylum in removal proceedings.

**1. *Provide guidance to officers on how to contact EOIR to resolve discrepancies between documents submitted with a Form I-765 and data pulled from EOIR systems related to asylum applicants in removal proceedings.***

The absence of an electronic record of the filing of an asylum application with EOIR should not be dispositive and result in a denial of a Form I-765 without considering the documentary evidence submitted. An applicant for employment authorization must submit evidence that the Form I-589 has been filed in accordance with the asylum regulations, but electronic evidence is not required. If a USCIS officer determines the documentary evidence is not credible, then the decision should give the specific reason(s) why and refer to evidence in the record that supports the conclusion. Moreover, to minimize further delays, the officer should consider either inquiring with EOIR

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<sup>371</sup> "Post-Order Instructions for Individuals Granted Relief or Protection from Removal by Immigration Court" (Dec. 6, 2019); <https://www.uscis.gov/sites/default/files/document/guides/PostOrderInstructions.pdf> (accessed Mar. 2, 2022).

<sup>372</sup> Immigration and Customs Enforcement (ICE) Memorandum, "Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion" (Apr. 3, 2022); [https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement\\_guidanceApr2022.pdf](https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf) (accessed May 19, 2022) and information provided by EOIR (May 11, 2022).

<sup>373</sup> Getting in touch with someone at the Contact Center is a challenge not just for new asylees. Stakeholders have described similar delays and challenges faced by individuals requesting green cards from USCIS after receiving adjustment of status by IJs. Information provided by stakeholders (Apr. 20 and 28, 2022).

<sup>374</sup> Information provided by stakeholders (Feb. 24, 2022).

<sup>375</sup> USCIS Web page, "Check Case Processing Times;" <https://egov.uscis.gov/processing-times/> (accessed May 10, 2022) (posted processing times for I-765 in the (a)(5) category at the Nebraska and Texas Service Centers).

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<sup>376</sup> ORR Fact Sheet, "Refugee Benefits for Asylees" (Jan. 2020); [https://www.acf.hhs.gov/sites/default/files/documents/orr/orr\\_asylee\\_fact\\_sheet.pdf](https://www.acf.hhs.gov/sites/default/files/documents/orr/orr_asylee_fact_sheet.pdf) (accessed Mar. 4, 2022).

<sup>377</sup> EOIR, "Adjudication Statistics: Asylum Decision Rates;" <https://www.justice.gov/eoir/page/file/1248491/download> (accessed Mar. 7, 2022).

<sup>378</sup> Information provided by USCIS (Apr. 25, 2022).

<sup>379</sup> Information provided by USCIS (Apr. 6, 2022). The data includes asylum and non-asylum IJ grants, such as lawful permanent residence and conditional permanent residence status.

or issuing a request for evidence or notice of intent to deny before issuing a denial notice because missing data could be an administrative error not caused by the applicant. By providing guidance to officers on how to contact EOIR to resolve discrepancies between documents submitted with a Form I-765 and relevant data pulled from EOIR systems, USCIS will not deny employment authorization to eligible applicants.

**2. *Leverage information sharing and IT systems to simplify the process of creating EADs and Forms I-94.***

Under the MOA with EOIR, USCIS officers have access to EOIR asylum information for immigration status verification purposes, including whether an IJ has granted or denied asylum. USCIS can abide by 8 U.S.C. § 1738 by using EOIR systems to determine that an IJ has granted asylum without requiring the individual to present the paper IJ order in person. Absent other available information, confirmation via EOIR's secure electronic systems should be sufficient to verify status.

USCIS could leverage ELIS<sup>380</sup> to make asylum EAD Clock information easily available to applicants and their legal representatives and extend online filing for Form I-765 to the (c)(8) category. If steps necessary to create a Form I-94 cannot be performed without the applicant being present, then USCIS and EOIR could combine full data sharing with enhanced IT capabilities to build a process where an IJ grant entered into the EOIR system would automatically trigger the scheduling of an in-person appointment at a USCIS field office. USCIS could also augment its online self-service tools to allow asylum applicants to request an appointment at a field office to obtain proof of asylee status. This would improve individuals' ability to request customer service and relieve pressure on Contact Center access for all callers, not just asylees.

**3. *Designate the IJ order granting asylum as acceptable evidence for Form I-9 employment verification purposes.***

DHS could also consider updating the M-274 Handbook to include the IJ order as a List C document, at least for a minimum period of time, to alleviate applicants' pain points resulting from USCIS delays. The IJ order would only serve as proof of status and not be a grant of employment authorization.

The CIS Ombudsman believes the recommendation is consistent with sections 274A(b)(1)(C) and (E) of the INA that gives the DHS Secretary authority to identify what documentation is acceptable for I-9 employment verification purposes.<sup>381</sup> There is no express statutory language limiting a document evidencing employment authorization to a DHS-issued document. Under 8 U.S.C. § 1324a, List C documents can be a Social Security card that does not prohibit employment or "other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section."<sup>382</sup> The CIS Ombudsman acknowledges providing an IJ order still requires the asylee to present a List B (identity) document, which may be difficult for many, and some asylees may not want their employers to know that they have been in removal proceedings.

**4. *Consider a pilot program which places USCIS immigration services officers who have authority to provide USCIS documents in certain immigration courts.***

Immediately after an IJ grants asylum and concludes removal proceedings, a USCIS officer would be available to provide Form I-94 or at least start the process for producing a Form I-94 that can be mailed directly to the applicant, thus bypassing the Contact Center.

<sup>380</sup> In response to the CIS Ombudsman Recommendation 50, "Employment Authorization for Asylum Applicants: Recommendations to Improve Coordination and Community," USCIS indicated it would "explore the feasibility of making an applicant's asylum clock information available online in the Electronic Immigration System (ELIS). . . ." USCIS Response to Recommendation #50 (Jan. 4, 2012); <https://www.dhs.gov/sites/default/files/publications/USCIS%20Response%20to%20Formal%20Recommendation%2050.pdf> (accessed Apr. 21, 2022). At the time, ELIS was in development. ELIS is now functional and USCIS processes many of its high-volume forms through the ELIS platform. DHS Office of Inspector General Report, "Continued Reliance on Manual Processing Slowed USCIS' Benefits Delivery during the COVID-19 Pandemic," OIG-22-12 (Dec. 28, 2021), p. 2; <https://www.oig.dhs.gov/sites/default/files/assets/2022-01/OIG-22-12-Dec21.pdf> (accessed Apr. 19, 2022).

<sup>381</sup> 8 INA § 274A(b)(1)(C)(ii) and (E); 8 U.S.C. § 1324a(b)(1)(C) and (E).

<sup>382</sup> 8 INA § 274A(b)(1)(C); 8 U.S.C. § 1324a(b)(1)(C).





## USCIS and Digital Strategy: NEARING AN INFLECTION POINT

### RESPONSIBLE DIRECTORATE

Office of Information Technology

### INTRODUCTION

Although there is still much more work to accomplish, the CIS Ombudsman is optimistic that U.S. Citizenship and Immigration Services' (USCIS') digital strategy is nearing an inflection point. USCIS made progress implementing its digital strategy in 2021, adding two high-volume immigration benefit forms (Form I-765, *Application for Employment Authorization*, and Form I-821, *Application for Temporary Protected Status*) to its online offerings.

At the same time, it expanded the number of paper-based applications that it adjudicates through its digital platform.

It appears to the CIS Ombudsman that the pace of progress is accelerating following a slowdown in FYs 2020 and 2021. More specifically, USCIS expects to make online filing available for several high-volume forms in FYs 2022 and 2023, including Form I-485, *Application to Register Permanent Residence or Adjust Status*. USCIS also shared that it is adding new features and improvements to myUSCIS, its online customer platform.<sup>383</sup> In September 2021, USCIS submitted to Congress its plan to meet its goal of offering end-to-end online filing and processing for all immigration forms by the end of FY 2026, at an estimated cost of \$371 million.

<sup>383</sup> myUSCIS is the agency's platform that allows individuals and employers to create an online account where they can file their applications and petitions online, pay the correct filing fee online, monitor their case status, view USCIS notices, and upload documents responsive to requests for evidence (RFEs), and otherwise securely correspond with the agency. USCIS Webpage, "Benefits of a USCIS Online Account" (Dec. 10, 2020); <https://www.uscis.gov/file-online/benefits-of-a-uscis-online-account> (accessed Mar. 31, 2022).

In December 2021, the Department of Homeland Security's (DHS's) Office of Inspector General (OIG) issued a report criticizing USCIS dependence on paper-based forms and records, concluding that the delay in fully transitioning to a digital environment prevented it from operating efficiently during the COVID-19 pandemic.<sup>384</sup> While the CIS Ombudsman largely agrees with this assessment, delays have plagued the agency's digitization efforts for nearly 15 years, through four administrations, six sessions of Congress, and multiple USCIS directors and leadership teams. If the agency can combine the lessons learned from past challenges and missteps together with its more recent successes, it can succeed in moving its digitization efforts forward with unstoppable momentum.

## RECOMMENDATIONS

To keep and improve the pace of its current digital strategy activities, USCIS should consider the following:

1. Set application programming interface integration and online filing for Form I-912, *Request for Fee Waiver*, as immediate priorities.
2. Create and initiate a targeted, nationwide myUSCIS promotion campaign to encourage individuals and employers to submit forms online.
3. Develop more meaningful incentives for filing online.
4. Create a central portal and system to receive and forward Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, to the USCIS office that has the relevant benefit file.

<sup>384</sup> DHS OIG, "Continued Reliance on Manual Processing Slowed USCIS' Benefits Delivery during the COVID-19 Pandemic," OIG-22-12 (Dec. 28, 2021), p. 14; <https://www.oig.dhs.gov/reports/2022/continued-reliance-manual-processing-slowed-uscis-benefits-delivery-during-covid-19-pandemic/oig-22-12-dec21> (accessed May 3, 2022). The report noted that "planned IT system enhancements and new electronic processing solutions were postponed when USCIS removed \$118 million" from its budget.

## BACKGROUND

USCIS began its transition from a paper-based immigration system to an electronic platform in 2007<sup>385</sup> but suffered numerous fits and starts over the ensuing years.<sup>386</sup> As originally envisioned, USCIS intended to decommission its various legacy information technology systems and to replace its paper-based process with a single, fully integrated digital system capable of providing end-to-end processing. The digital system would allow USCIS to receive, vet, adjudicate, store, and communicate about forms entirely online.<sup>387</sup> However, creating an entirely new system proved to be too big of a lift. By 2017, the agency shifted away from this approach, determining that it could best deliver on its goal of digitization instead by leveraging, improving, and integrating its existing systems.<sup>388</sup>

The agency uses its Electronic Immigration System (ELIS) as the platform to access various existing systems for information and action. It offers myUSCIS as the customer-facing interface where individuals and employers can create an online account to submit forms online, pay filing fees, track their cases, and correspond with USCIS online.<sup>389</sup>

### Key Data Points in 2021

- Online filing was available for 12 USCIS forms.<sup>390</sup>
- 8 million myUSCIS accounts were active.<sup>391</sup>

<sup>385</sup> USCIS, "USCIS Transformation Program: Concept of Operations Ver 1.5" (Mar. 28, 2007); <https://www.hsdl.org/?view&did=483127> (accessed Mar 25, 2022).

<sup>386</sup> See CIS Ombudsman's Annual Report 2021, pp. 53–58 and fns. 305 and 307.

<sup>387</sup> DHS, "Privacy Impact Assessment for the USCIS Electronic Immigration System (USCIS ELIS)" (Dec. 3, 2018), p. 1; <https://www.dhs.gov/sites/default/files/publications/pia-uscis-elis056a-december2018.pdf> (accessed Mar. 25, 2022).

<sup>388</sup> Amelia Brust, "USCIS optimistic eProcessing will work to cut down paper records," *Federal News Network* (Nov. 27, 2018); <https://fedciv.g2xchange.com/federal-news-network-uscis-optimistic-e-processing-will-work-to-cut-down-paper-records/> (accessed Mar. 25, 2022).

<sup>389</sup> DHS, "Privacy Impact Assessment for the myUSCIS Account Experience" (Dec. 15, 2017); <https://omb.report/icr/202007-1615-047/doc/103209001> (accessed Mar. 25, 2022).

<sup>390</sup> See USCIS Web page, "Forms Available to File Online" (Apr. 12, 2022); <https://www.uscis.gov/file-online/forms-available-to-file-online> (accessed May 31, 2022). This lists 14 forms current as of May 2022; Form I-821, *Application for Temporary Protected Status*, was added on March 23, 2022 and Form I-821D, *Consideration of Deferred Action for Childhood Arrivals*, was added on April 12, 2022.

<sup>391</sup> USCIS, "Section 4103 Plan Pursuant to the Emergency Stopgap Stabilization Act—Fiscal Year 2021 Report to Congress," p. 6 (Sept. 7, 2021); <https://www.uscis.gov/sites/default/files/document/reports/SIGNED-Section-4103-FY2021-Report-9-7-21.pdf> (accessed Mar. 27, 2022).

- USCIS received 1,325,000 benefit requests submitted online (approximately 15 percent of all requests).<sup>392</sup>
- USCIS digitized approximately 69 percent of all paper forms it received to process electronically to completion.<sup>393</sup>
- USCIS received 308,504 online FY 2023 H-1B cap lottery registrations.<sup>394</sup>

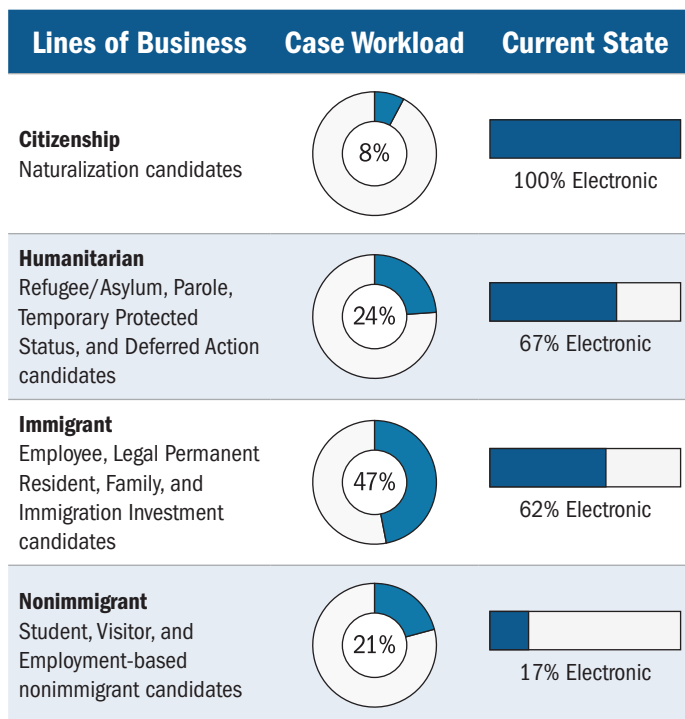
## USCIS' PROGRESS WITH DIGITIZATION

USCIS divides its various immigration forms into four lines of business: citizenship, humanitarian, immigrant, and nonimmigrant.<sup>395</sup> USCIS defines digital processing to mean that it processes one or more of the forms in a line of business entirely electronically or through a combination of paper filing and back-end electronic processing. In FY 2021, USCIS reported that it had completely digitized its citizenship line of business.<sup>396</sup> USCIS also reported that it had digitized 67 percent of its humanitarian line of business, 62 percent of its immigrant line of business, and 21 percent of its nonimmigrant line of business. See Figure 7.1.

In this reporting period, USCIS implemented in part a 2019 CIS Ombudsman recommendation to make Form I-765 available for online filing.<sup>397</sup> This is significant not only because USCIS receives 2 million or more Form I-765 applications annually,<sup>398</sup> but also because it provides filers with the comfort of knowing that USCIS has received their

**Figure 7.1**

State of End-to-End Electronic Processing Progress to Date and Case Workload by Line of Business as of September 7, 2021



Source: USCIS, Section 4103 Report, p. 4 (accessed Mar. 27, 2022).

forms.<sup>399</sup> Additionally, USCIS made Form I-821 available online for initial Temporary Protected Status (TPS) applicants, enabling them to file it online together with Form I-765, a first.<sup>400</sup> Later in the year, USCIS extended this online option to those seeking to reregister for TPS. This development opens an online pathway for hundreds of thousands of TPS benefit requests annually.<sup>401</sup>

**Agency Shortfalls.** There were several shortfalls in 2021 as well as successes. Due to the agency's previous delay in offering an online filing option for employers petitioning to hire H-2A agricultural workers using Form I-129, *Petition*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> USCIS, "Section 4103 Plan Pursuant to the Emergency Stopgap Stabilization Act—Fiscal Year 2021 Report to Congress," p. 2 (Sep. 7, 2021); <https://www.uscis.gov/sites/default/files/document/reports/SIGNED-Section-4103-FY2021-Report-9-7-21.pdf> (accessed Mar. 27, 2022).

<sup>396</sup> *Id.* According to USCIS, in the Citizenship line of business, there are four forms that do not warrant the resources needed to make them available online based on their low filing volume, specifically Form N-644, *Application for Posthumous Citizenship*, Form N-470, *Application to Preserve Residence for Naturalization Purposes*, Form N-648, *Medical Certification for Disability Exceptions*, and Form N-300, *Application to File Declaration of Intention*.

<sup>397</sup> CIS Ombudsman's Annual Report 2019, p. 84.

<sup>398</sup> USCIS received 2,594,988 initial and renewal EAD receipts in the 4<sup>th</sup> Quarter of 2021; 1,969,954 in the 4<sup>th</sup> Quarter of 2020; and 2,189,243 in the 4<sup>th</sup> Quarter of 2019. USCIS, "Number of Service-wide Forms by Quarter, Form Status, and Processing Time, FY 2021, Q4" (Dec. 15, 2021); [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf); "Number of Service-wide Forms by Fiscal Year to date by Quarter and Form Status, FY 2020" (Jan. 25, 2021); [https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2020Q4.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2020Q4.pdf); "Number of Service-wide Forms by Fiscal Year to date by Quarter and Form Status, FY 2019" (Jan. 14, 2020); [https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2019Q4.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2019Q4.pdf) (accessed Mar. 31, 2022).

<sup>399</sup> The CIS Ombudsman reported last year that many EAD applicants were having difficulties because of a USCIS delay in receipting their paper-filed submissions, including rejections for issues which could not be fixed. See CIS Ombudsman's Annual Report 2021, pp. 67–68.

<sup>400</sup> USCIS Press Release, "TPS Applicants from Five Designated Countries Can Now File Initial Applications Online" (Jul. 21, 2021); <https://www.uscis.gov/news/news-releases/tps-applicants-from-five-designated-countries-can-now-file-initial-applications-online> (accessed Mar. 31, 2022).

<sup>401</sup> USCIS received 335,249 TPS initial filings and reregistration in FY 2020 and 301,778 in FY 2021. USCIS, "Number of Service-wide Forms by Quarter, Form Status, and Processing Time, FY 2021, Q4" (Dec. 15, 2021); [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q4.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q4.pdf); "Number of Service-wide Forms by Fiscal Year to date by Quarter and Form Status, FY 2020" (Jan. 25, 2021); [https://www.uscis.gov/sites/default/files/document/reports/Quarterly\\_All\\_Forms\\_FY2020Q4.pdf](https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2020Q4.pdf) (accessed Mar. 31, 2022).

for a Temporary Nonimmigrant Worker, it was expected that it would do so during this reporting period.<sup>402</sup> The CIS Ombudsman also expected USCIS to roll out an online Form I-589, *Application for Asylum and for Withholding of Removal*.<sup>403</sup> Neither happened. This is unfortunate given the Secretary of Homeland Security's recent designation of Ukrainians for TPS<sup>404</sup> and the government-wide commitment to creating pathways for eligible Afghans and Ukrainians to resettle in the United States using various mechanisms, including humanitarian parole,<sup>405</sup> refugee processing,<sup>406</sup> and asylum.<sup>407</sup> While USCIS is processing both of these forms electronically, it has yet to fully enable online filing.<sup>408</sup> USCIS' Office of Information Technology's (OIT's) budget was cut by 32 percent in FY 2020, forcing the agency to make difficult choices as it reprioritized what it could accomplish and what would have to wait.<sup>409</sup>

*Online Filing Developments for FY 2023.* USCIS has shared its digital strategy roadmap forecasting the additional online offerings it plans to deliver over the next 18 months.<sup>410</sup> In addition to Form I-129, *Petition for a Nonimmigrant Worker* (filed for temporary agricultural workers), and Form I-589 for asylum applicants, USCIS is planning to offer an online filing option for Form I-912, Form I-485, Form I-864, *Affidavit of Support under Section 213A of the INA*, and Form I-907, *Request for Premium Processing Service*. Further along on the development horizon is Form I-751, *Petition to Remove Conditions on Residence*, the potential expansion of online filing of Form I-129 for additional nonimmigrant workers, and Form I-912, *Request for Fee Waiver*.<sup>411</sup>

## EXPANDING THE REACH OF myUSCIS

As of September 30, 2021, more than 8,000,000 unique customers have created a myUSCIS account. FY 2021 web traffic data shows that myUSCIS recorded approximately 5 million sessions per month.<sup>412</sup>

During this past year, USCIS expanded the reach of myUSCIS by digitizing paper-based filings and assigning them an Online Access Code (OAC) with which customers can open a myUSCIS account and access the same options and ability to track and manage their cases like those who filed their cases online.<sup>413</sup> More specifically, myUSCIS account holders who filed directly or linked their cases using an OAC can:

- Check their case status;
- Receive case alerts automatically;
- Access USCIS notices of action electronically;
- Send and receive secure messages;
- Update contact information (including change of address); and
- Enter or withdraw their appearance as attorney or representative of record.

Current myUSCIS account users who file Form N-400, *Application for Naturalization*, or Form I-90, *Application to Replace Permanent Resident Card* online now receive

<sup>402</sup> The agency was prevented from moving forward on an online form, in part, because its new category-specific Form I-129 was published in connection with its most recent fee-setting rule, "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 85 Fed. Reg. 46788 (Aug. 3, 2020), which was enjoined from implementation by the court in *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520 (N.D. Cal. 2020).

<sup>403</sup> See generally CIS Ombudsman's Annual Report 2021, pp. 56–57. See also USCIS, Section 4103 Report, p. 7.

<sup>404</sup> DHS Press Release, "Secretary Mayorkas Designates Ukraine for Temporary Protected Status for 18 Months," (Mar. 3, 2022); <https://www.dhs.gov/news/2022/03/03/secretary-mayorkas-designates-ukraine-temporary-protected-status-18-months> (accessed Mar. 28, 2022).

<sup>405</sup> See USCIS Web page, "USCIS Information for Afghan Nationals on Requests to USCIS for Humanitarian Parole," Dec. 8, 2021; <https://www.uscis.gov/humanitarian/humanitarian-parole/information-for-afghan-nationals-on-requests-to-uscis-for-humanitarian-parole> (accessed Mar. 28, 2022); USCIS Web page, "Uniting for Ukraine" (May 6, 2022); <https://www.uscis.gov/ukraine> (accessed May 17, 2022).

<sup>406</sup> White House Briefing Room, Fact Sheet, "The Biden Administration Announces New Humanitarian, Development, and Democracy Assistance to Ukraine and the Surrounding Region" (Mar. 24, 2022); <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/24/fact-sheet-the-biden-administration-announces-new-humanitarian-development-and-democracy-assistance-to-ukraine-and-the-surrounding-region/> (accessed Mar. 29, 2022); USCIS Web page, "Information for Afghan Nationals" (Apr. 12, 2022); <https://www.uscis.gov/humanitarian/information-for-afghan-nationals> (accessed May 17, 2022).

<sup>407</sup> Luke Gentile, "Thousands of Ukrainians and Russians Descend on US Southern Border," *Washington Examiner* (Mar. 25, 2022); <https://www.washingtonexaminer.com/news/thousands-of-ukrainians-and-russians-descend-on-us-southern-border> (accessed Mar. 28, 2022). According to the article, "[a]t least 30,000 Russians and 10,000 Ukrainians arrived in Mexico at the start of the year, up from the averages of previous years, according to the *Wall Street Journal*, citing Mexican immigration officials... No visa is required for Ukrainian travel to Mexico, and, once at the southern border, they can reach out to U.S. officials for asylum or humanitarian parole."

<sup>408</sup> After receiving a paper Form I-589, USCIS enters the data into ELIS and processes these filings electronically.

<sup>409</sup> DHS OIG, "Continued Reliance on Manual Processing Slowed USCIS' Benefits Delivery during the COVID-19 Pandemic," OIG-22-12 (Dec. 28, 2021), p. 14; <https://www.oig.dhs.gov/reports/2022/continued-reliance-manual-processing-slowed-uscis-benefits-delivery-during-covid-19-pandemic/oig-22-12-dec21> (accessed May 3, 2022). The report noted that "planned IT system enhancements and new electronic processing solutions were postponed when USCIS removed \$118 million" from its budget.

<sup>410</sup> USCIS, "Section 4103 Plan Pursuant to the Emergency Stopgap Stabilization Act—Fiscal Year 2021 Report to Congress," p. 7 (Sept. 7, 2021); <https://www.uscis.gov/sites/default/files/document/reports/SIGNED-Section-4103-FY2021-Report-9-7-21.pdf> (accessed Mar. 27, 2022).

<sup>411</sup> Information provided by USCIS (Feb. 2, 2022).

<sup>412</sup> Information provided by USCIS (May 19, 2022).

<sup>413</sup> Customers must first link the digitized form to their myUSCIS account using the OAC that USCIS assigns.

personalized processing times. USCIS claims that such personalized process times are more accurate because they are updated frequently, and USCIS expects to expand personal processing times to other myUSCIS forms in FY 2023. Additionally, USCIS customers can now add Form I-797 receipt notices (case numbers) to their myUSCIS accounts, providing users a one-stop location where they can review the status of all pending submissions with the agency.<sup>414</sup> USCIS informed the CIS Ombudsman that in the next reporting period, it will be improving and expanding myUSCIS' functionality by extending its myUSCIS account features to all paper-linked forms.

## STAKEHOLDER FEEDBACK ON CURRENT ONLINE FILING OPTIONS

In the past year, USCIS conducted webinars promoting the advantages of online filing and establishing a myUSCIS account.<sup>415</sup> The CIS Ombudsman also hosted multiple similar webinars.<sup>416</sup>

*USCIS Needs to Develop an Application Programming Interface (API).* USCIS and the CIS Ombudsman has also engaged with the immigration legal community and immigration forms and management system vendors with the goal of building system-to-system data transfer interfaces that will streamline online filing by high-volume users. Our interactions with stakeholders confirmed that many attorneys, accredited representatives, and other high-volume immigration benefit filers generally do not file online because the USCIS system is cumbersome and inefficient.<sup>417</sup> Large volume filers depend on third-party vendor case management systems to collect data as well as manage and track the progress of hundreds and

even thousands of filings.<sup>418</sup> However, USCIS has yet to create an API to facilitate a direct system-to-system data exchange. Stakeholders see little advantage to online filing given the current lack of systems integration.<sup>419</sup> The CIS Ombudsman understands this as for many stakeholders, doing so would require them to input clients' data twice (once into their case management system, and again if they wish to file their client's benefit request online), creating a significant inefficiency and increasing the potential for making a costly typographical error.

USCIS' tardiness in developing an API is puzzling.<sup>420</sup> Many high-volume benefit filers will readily make this transition to filing submissions online as soon as the necessary API is in place. In the interim, stakeholders continue to urge USCIS to allow them to use digital signature technologies as they continue to file their submissions via paper.<sup>421</sup> They cite many inconveniences and delays that flow from USCIS' longstanding requirement that petitioners and applicants provide a wet (original) signature on its benefit applications and petitions.<sup>422</sup>

*More IT Support for myUSCIS Users.* Stakeholders continued to express frustration that they cannot obtain timely technical support from USCIS when encountering difficulties with using myUSCIS or filing submissions online.<sup>423</sup> They report that after reaching out to USCIS' Contact Center or sending emails requesting assistance, the agency sometimes takes days to respond or does not

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> USCIS reported that "[i]n June 2020 and March 2021, [its] working group conducted focus groups of applicants and legal representatives (including recognized organizations) to better understand their challenges with adoption of the USCIS online account, online filing, and the potential of third-party software integration. *The USCIS Office of Information Technology among other offices within the Agency participate in the working group to be able to incorporate feedback into future technical development and prioritization* (emphasis added); USCIS, "Section 4103 Plan Pursuant to the Emergency Stopgap Stabilization Act—Fiscal Year 2021 Report to Congress," pp. 2–3 (Sept. 7, 2021); <https://www.uscis.gov/sites/default/files/document/reports/SIGNED-Section-4103-FY2021-Report-9-7-21.pdf> (accessed Mar. 28, 2022). In addition, the CIS Ombudsman has previously recommended that the agency work with stakeholders and software developers to create data-sharing protocols and standards to establish system-to-system interactivity with ELIS. CIS Ombudsman's Annual Report 2018, pp. 24, 27.

<sup>421</sup> Notes from CIS Ombudsman Webinars, "USCIS Introduces Online Filing for Form I-765, Application for Employment Authorization for F-1 Students Seeking Optional Practical Training (May 5, 2021)" and "Overview of myUSCIS for Applicants (Jan. 20, 2022);" notes from USCIS Listening Session (USCIS APIs) (Feb. 10, 2022) (all in possession of the CIS Ombudsman); and information provided by stakeholders (Aug. 18, 2021, Nov. 9, 2021, Mar. 16, 2022, and Apr. 6, 2022).

<sup>422</sup> *Id.*

<sup>423</sup> Notes from CIS Ombudsman Webinars, May 5, 2021, "USCIS Introduces Online Filing for Form I-765, Application for Employment Authorization for F-1 Students Seeking Optional Practical Training" and Jan. 20, 2022, "Overview of myUSCIS for Applicants" (all in possession of the CIS Ombudsman); information received from stakeholders (Aug. 18, 2021, Nov. 9, 2021, Jan. 12, 2022, and Apr. 13, 2022).

<sup>414</sup> While these non-digitized applications and petitions may be added into a myUSCIS account, only the "check case status" feature is currently available for those filings. Information provided by USCIS (Feb. 2, 2022).

<sup>415</sup> USCIS webinars: "Form I-821, Application for Temporary Protected Status" (Aug. 5, 2021) and "Form I-765, Application for Employment Authorization for F-1 Students Seeking OPT" (Apr. 22, 2021). See USCIS Webpage, "Notes from Previous Engagements," [https://www.uscis.gov/outreach/notes-from-previous-engagements?ddt\\_mon=&ddt\\_yr=&query=&items\\_per\\_page=10&options%5Bvalue%5D&page=1](https://www.uscis.gov/outreach/notes-from-previous-engagements?ddt_mon=&ddt_yr=&query=&items_per_page=10&options%5Bvalue%5D&page=1) (accessed May 31, 2022).

<sup>416</sup> These CIS Ombudsman webinars included: "Overview of myUSCIS for Applicants" (Jan. 14, 2022); "USCIS Introduces Online Filing for Form I-821, Application for Temporary Protected Status" (Aug. 5, 2021); "USCIS' Online Filing and Customer Service Tools" (Mar. 31, 2021); "USCIS Introduces Online Filing for Form I-765, Application for Employment Authorization for F-1 Students Seeking Optional Practical Training" (May 5, 2021); See CIS Ombudsman Web page, "Outreach" (May 19, 2022); <https://www.dhs.gov/outreach> (accessed May 31, 2022).

<sup>417</sup> CIS Ombudsman notes from the American Immigration Lawyer Association IT Summit (Dec. 8, 2021); CIS Ombudsman notes from USCIS Listening Session, "USCIS APIs" (Feb. 10, 2022) (both in possession of the CIS Ombudsman); information received from stakeholders (Aug. 18, 2021, Nov. 9, 2021, Mar. 16, 2022, and Apr. 6, 2022).

respond at all.<sup>424</sup> As of February 2022, USCIS disclosed that it has only eight technology professionals on its myUSCIS Technical Support Team, with an additional 21 support staff to handle help desk tickets.<sup>425</sup> The CIS Ombudsman remains concerned that USCIS has not done more to address this issue and urge them to add technological capability.

*Future Outreach and Education.* USCIS intends to provide additional tools as it seeks to promote myUSCIS and online filing to customers. Specifically, USCIS expects to use social media, targeted emails, and text messages and to add information to paper receipt notices and other correspondence to promote online communication and filing. USCIS will also be creating tutorial videos, beginning with how to file a Form N-400 online.<sup>426</sup>

The CIS Ombudsman fully endorses these plans. The CIS Ombudsman believes USCIS needs to promote the benefits that flow from digitization through a focused and sustained education campaign explaining the benefits of online filing, and how it helps the agency reduce its operating costs, minimize errors, and streamline processing times.

USCIS has already invested billions of dollars in building a modern electronic platform to transform the way it administers the nation's immigration benefit system,<sup>427</sup> and commensurate with this shift, it is important that the agency not underfund the support to make the system successful, including additional technical support as needed and a thorough public education campaign. Additionally, USCIS should create a clear and meaningful incentive (monetary or otherwise) for filing requests online and ensure the incentive becomes a part of the campaign.

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## CONGRESS FOCUSING ON USCIS' DIGITIZATION EFFORTS

Although USCIS has made strides in online filing and electronic processing, Congress has continued to focus on USCIS' digitization efforts and its impact on the agency's operations and finances.

*The Need for Digitization in the Pandemic Held the Agency Back.* In June 2020, Congress requested that the DHS OIG conduct a review of USCIS' continuity of operations plans

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<sup>424</sup> Notes from USCIS Listening Session ("USCIS APIs") (Feb. 10, 2022).

<sup>425</sup> Information provided by USCIS (Feb. 2, 2022).

<sup>426</sup> *Id.*

<sup>427</sup> The initial estimated cost for the entire initiative was \$536 million, increasing to a revised estimate of \$3.1 billion by 2033, including operations and maintenance costs for up to 15 years after full system deployment. DHS OIG, "USCIS Automation of Immigration Benefits Processing Remains Ineffective," OIG 16-48 (Mar. 2016); <https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/2016/OIG-16-48-Mar16.pdf> (accessed May 3, 2022).

in response to the COVID-19 pandemic.<sup>428</sup> The DHS OIG found that:

- USCIS' primary operational challenge was "its continued reliance on paper files to process and deliver benefits."
- Productivity fell during the pandemic,<sup>429</sup> which OIG attributed to "funding cuts and lost fee revenue" that limited spending on technology and equipment issues during this time.<sup>430</sup>
- 850,000 benefit applicants suffered delays with providing biometrics at Application Support Centers due to closures and limited capacity after reopening.<sup>431</sup>
- Processing times increased and backlogs grew by 1.3 million cases.<sup>432</sup>

USCIS concurred with the DHS OIG's findings. The DHS OIG also advanced two specific recommendations for USCIS to:

1. Update its pandemic plan to incorporate additional technology guidance and lessons learned during the COVID-19 pandemic; and
2. Develop an updated strategy and funding plan to digitize all immigration benefit work and performance measures to track improvement in case processing times.<sup>433</sup>

*Emergency Stopgap USCIS Stabilization Act and USCIS' Response.* As discussed in the 2021 Annual Report, Congress passed the Emergency Stopgap USCIS Stabilization Act (Stabilization Act) in direct response to financial distress that USCIS suffered through in FY 2020 when filing fee revenues dropped soon after COVID-19 struck.<sup>434</sup> The Stabilization Act provided a pathway for USCIS to generate additional revenues by increasing

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<sup>428</sup> DHS OIG, "Continued Reliance on Manual Processing Slowed USCIS' Benefits Delivery during the COVID-19 Pandemic" (Dec. 28, 2021), p. 14; <https://www.oig.dhs.gov/sites/default/files/assets/2022-01/OIG-22-12-Dec21.pdf> (accessed Mar. 29, 2022). DHS OIG completed this review in May 2021 and publicly issued its report on Dec. 28, 2021.

<sup>429</sup> "USCIS' field offices completed approximately 50 percent fewer cases from March to June 2020 during temporary office closures, as compared with the same timeframe during 2019 ... and from July 2020 through February 2021, field offices processed on average nearly 55,000 fewer cases per month than the same 8-month period the year before." *Id.* p. 8.

<sup>430</sup> DHS OIG found that "[k]ey technology systems experienced performance interruptions or degradation during the pandemic," compromising in some form approximately 2000 ELIS-system hours." *Id.* p. 12.

<sup>431</sup> *Id.* p. 16.

<sup>432</sup> *Id.* p. 15.

<sup>433</sup> This recommendation is consistent with the requirement in Section 4103 of the Emergency Stopgap USCIS Stabilization Act that USCIS provide Congress with a 5-year development and detailed funding plan. The report was submitted to Congress on Sep. 7, 2021.

<sup>434</sup> CIS Ombudsman's Annual Report 2021, p. 10.

premium processing (accelerated adjudication) fees for some forms<sup>435</sup> and further authorized USCIS to offer this service on additional forms.

Beyond its principal focus of addressing USCIS' immediate financial challenges, Section 4103 of the Stabilization Act instructed the agency to provide the appropriate congressional committees with a detailed 5-year plan to:

1. Establish electronic filing procedures for all immigration applications and petitions;
2. Accept electronic payment of fees at all filing locations;
3. Issue correspondence, including decisions, requests for evidence, and notices of intent to deny, to immigration benefit requestors electronically; and
4. Improve processing times for all immigration and naturalization benefit requests.

Source: USCIS, Section 4103 Report, pp. 13-14.

USCIS filed its Section 4103 Report on September 7, 2021, projecting that its 5-year IT costs to expand domain capabilities and end-to-end electronic processing to all requests for benefits at approximately \$371 million.<sup>436</sup> It noted that the agency expects to continue accepting paper filings for the foreseeable future.<sup>437</sup> The agency intends to make online filing available for its humanitarian line of business, followed by the nonimmigrant and finally the immigrant lines of business. USCIS also described the performance metrics it will use to assess its progress. USCIS caveated that its ability to meet its Section 4103 requirements depends on multiple factors, including continued funding based on customer demand for premium processing and implementing the next fee rule.<sup>438</sup>

<sup>435</sup> Effective October 19, 2021, USCIS raised the premium processing fee from \$1,440 to \$2,500 for Form I-140, *Petition for an Immigrant Worker*, and Form I-129, *Petition for a Nonimmigrant Worker* (except for Forms I-129 filed for H-2 and R visa workers). As a point of reference, USCIS received approximately 340,316 requests for premium processing in FY 2020, and 397,475 in FY 2021. See "Implementation of the Emergency Stopgap USCIS Stabilization Act," 87 Fed. Reg. 18227, 18238 (Mar. 30, 2022).

<sup>436</sup> USCIS, "Section 4103 Plan Pursuant to the Emergency Stopgap Stabilization Act—Fiscal Year 2021 Report to Congress," p. 15 (Sept. 7, 2021); <https://www.uscis.gov/sites/default/files/document/reports/SIGNED-Section-4103-FY2021-Report-9-7-21.pdf> (accessed Mar. 27, 2022).

<sup>437</sup> *Id.* p. v.

<sup>438</sup> *Id.* p. 15.

## CIS OMBUDSMAN'S OBSERVATIONS

The CIS Ombudsman has been tracking USCIS' digitization initiative since its inception in 2007. Despite setbacks and often sluggish progress, the results of these efforts are increasingly effective. The COVID-19 pandemic revealed that the immigration benefit system remains principally paper-based to the detriment of operating in a remote work environment. At the same time, USCIS has demonstrated a growing capacity for using electronic processing. Electronic intake and processing will undoubtedly reduce long-term operating costs as it gradually eliminates the need to move and store paper. Digitization will also further the agency's ability to maximize adjudication resources and rebalance its workloads on an enterprise level; improve quality control and adjudication consistency; and enhance overall immigration benefit system integrity through the increased use of data analytics. The CIS Ombudsman also expects that it will speed adjudications as the agency introduces and expands its use of machine processing and artificial intelligence.<sup>439</sup>

With Congressional pressure on the agency to complete its shift to an electronic platform by 2025, the CIS Ombudsman sees resource issues and customer adoption as the principal challenges the agency faces.<sup>440</sup> Congress recently authorized USCIS to access its premium processing revenues not only to fund the agency's IT development and its premium processing capacities but also to support its overall operations. Competing demands for these funds could place the agency's projected \$70 million annual IT budget need at risk.<sup>441</sup>

## RECOMMENDATIONS

1. ***Set API integration and online filing for Form I-912, Request for Fee Waiver, as immediate priorities.***

These two action items would undoubtedly lead to an increase in online filings. As discussed earlier,

<sup>439</sup> This article does not include an in-depth review of the use of artificial intelligence and other automated functions; however, the CIS Ombudsman notes USCIS has made strides in areas such as machine learning and streamlined processing using automation to assist in adjudicative functions. See D. Nyczepir, "USCIS Automating Pre-Processing of Immigration Case," *Fedscoop* (Apr. 15, 2021); <https://www.fedscoop.com/uscis-automating-immigration-pre-processing/> (accessed May 3, 2022); see also information provided by USCIS (Feb. 2, 2022).

<sup>440</sup> Some stakeholders identified that there may be an English language barrier inhibiting online filings. See CIS Ombudsman's Annual Report 2021, p. 58.

<sup>441</sup> USCIS, "Section 4103 Plan Pursuant to the Emergency Stopgap Stabilization Act—Fiscal Year 2021 Report to Congress," pp. 15-16 (Sept. 7, 2021); <https://www.uscis.gov/sites/default/files/document/reports/SIGNED-Section-4103-FY2021-Report-9-7-21.pdf> (accessed Mar. 27, 2022).

USCIS intends to release Form I-912 for online filing in the next fiscal year, but the agency's reluctance to do so until now has discouraged otherwise qualified individuals from filing for certain benefits online. For example, some people cannot file Form N-400 or I-90 online because they also need to file a Form I-912. Accordingly, the CIS Ombudsman supports calls by stakeholders for USCIS to digitize Form I-912.

**2. *Create and initiate a targeted, nationwide myUSCIS promotion campaign to encourage individual and employers to submit forms online.***

The money the agency spends to educate and promote online filing would be recaptured through savings for the agency through the reduced handling and storage of paper.

**3. *Develop more meaningful incentives for filing online.***

The CIS Ombudsman is confident that stakeholders will come to fully embrace online filing/processing in the coming years, yet the agency also acknowledges that there will likely be a portion of the public who will need to continue submitting forms by mail for a variety of reasons. At present, there is no direct monetary incentive for submitting a form online instead by mail. In its now-enjoined 2020 Fee Rule, USCIS had planned a \$10 discount for those who file online.<sup>442</sup> This amount is unlikely to accurately reflect the savings incurred. The CIS Ombudsman encourages USCIS to increase this amount but has insufficient information to recommend a specific sum.

**4. *Create a central portal and system to receive and forward Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, to the USCIS office that has the relevant benefit file.***

The CIS Ombudsman made this recommendation to USCIS in 2021 and presents it again here because it is critical. For the foreseeable future, attorneys and accredited representatives continue to have to submit interfiled paper Forms G-28 in connection with pending paper-based filings (that are on an adjudicator's desk or otherwise sitting in one of USCIS' file rooms) to ensure their receipt. Streamlining this process should be a priority.

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<sup>442</sup> "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Requests," 85 Fed. Reg. 46788, 46790 (Aug. 3, 2020).





## U Nonimmigrant Status Bona Fide Determination Process:

# SUCCESSES AND CHALLENGES IN TAKING ON A BACKLOG

### RESPONSIBLE DIRECTORATES

Office of Policy and Strategy, Service Center Operations

## INTRODUCTION

One of the most severe pain points stemming from the many backlogs at U.S. Citizenship and Immigration Services (USCIS) is the time it takes to qualify for and receive employment authorization. This has been keenly felt in recent years among victims of certain crimes who petition for U visas. They have endured years-long delays in the adjudication of their petitions and associated employment authorization, due in large part to the statutory cap of 10,000 U nonimmigrant visas that may be issued annually.<sup>443</sup> In June 2021, in response to these delays and to align more closely with statutory intent, USCIS created a Bona Fide Determination (BFD) process to “help provide stability to U [nonimmigrant] visa petitioners

<sup>443</sup> The Immigration and Nationality Act (INA) § 214(p)(2); 8 U.S.C. § 1184(p)(2).

supporting law enforcement efforts to investigate and prosecute crimes.<sup>7444</sup>

The BFD process was created to more closely follow the intent of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPA).<sup>445</sup> Its purpose is to provide victims of crimes with “stability and better equip them to cooperate with and assist law enforcement investigations and prosecutions”<sup>7446</sup> by granting deferred action and employment authorization to eligible petitioners and their qualifying family members (derivatives) while they wait for limited U visas to become available, in accordance with the statute.<sup>447</sup>

While generally successful and welcomed by stakeholders, the initial rollout of the BFD process experienced its share of minor issues. USCIS struggled with some clerical errors, such as erroneously accepting filing fees in connection with an application for an employment authorization document (EAD) when no such fee is required, or rejecting these applications when no fee was included.<sup>448</sup> USCIS also did not at first publish processing times for the BFD process, creating additional uncertainties in the application process. Further, the U visa program itself came under scrutiny in a report from the DHS Office of the Inspector General (DHS OIG) released in January 2022.<sup>449</sup>

USCIS proactively worked to resolve these issues and has now corrected fee issues and published current processing

times for the Form I-918.<sup>450</sup> In addition, USCIS has responded to recommendations made by the DHS OIG and is working to resolve certain identified issues.

The CIS Ombudsman examines this “success story” and illustrates the challenges the agency has overcome to implement the process benefiting tens of thousands of applicants awaiting adjudication. The BFD process is a step in the right direction in solving a severe backlog pain point, and USCIS’ creation of this process within its statutory authorization is a laudable step toward mitigating the negative effects of the backlogs. However, to fully realize the goals of this program, USCIS must work to reduce the lengthy delays that still impact this process and the relief it was created to provide.

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## THE ORIGINS OF THE U VISA

Noncitizens who are victims of crime and abuse may be reluctant to report the crimes committed against them out of fear of removal from the United States. Even when they report the crime or abuse, victims may not want to cooperate with the police investigation due to fear stemming from their immigration status or lack thereof. Having those crimes go unreported or uninvestigated not only affects the victim but also compromises public safety and law enforcement functions.

Congress created the U nonimmigrant visa classification as part of the Victims of Trafficking and Violence Protection Act in October 2000 (TVPA).<sup>451</sup> Congress’ intent in creating the new law was:

“to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of [noncitizens] and other crimes... while offering protection to victims of such offense in keeping with the humanitarian interests of the United States.”<sup>7452</sup>

Although TVPA only mentioned the protection of women and children, the protections afforded by the law are no longer gender- or age-specific. The law empowers

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<sup>444</sup> USCIS News Alert, “USCIS Issues Policy Providing Further Protections for Victims of Crime” (Jun. 14, 2021); <https://www.uscis.gov/newsroom/news-releases/uscis-issues-policy-providing-further-protections-for-victims-of-crime> (accessed Apr. 25, 2022).

<sup>445</sup> Publ. L. 110-457, 122 Stat. 5044 (2008).

<sup>446</sup> USCIS News Alert, “USCIS Issues Policy Providing Further Protections for Victims of Crime” (Jun. 14, 2021); <https://www.uscis.gov/newsroom/news-releases/uscis-issues-policy-providing-further-protections-for-victims-of-crime> (accessed Apr. 25, 2022).

<sup>447</sup> The Immigration and Nationality Act (INA) § 214(p)(6); 8 U.S.C. §1184(p)(6) (“The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 1011(a)(15)(U).” Deferred action is an exercise of prosecutorial discretion to make a noncitizen a lower priority for removal from the United States, but does not confer any immigration status. USCIS Policy Manual, Pt. C, Ch. 1 (B)(2) n. 21; <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-1#footnote-21> (accessed May 30, 2022).

<sup>448</sup> The EAD application is made by filing Form I-765, *Application for Employment Authorization*, with USCIS. No fee is required when filed in connection with a pending U visa petition, which is filed on Form I-918, *Petition for U Nonimmigrant Status*.

<sup>449</sup> DHS Office of the Inspector General, “USCIS’ U Visa Program Is Not Managed Effectively and Is Susceptible to Fraud,” OIG-22-10 (Jan. 6, 2022); <https://www.oig.dhs.gov/sites/default/files/assets/2022-01/OIG-22-10-Jan22-Redacted.pdf> (accessed Apr. 25, 2022).

<sup>450</sup> USCIS Web page, “Vermont Service Center and Nebraska Service Center Processing Times for form I-918;” <https://egov.uscis.gov/processing-times/> (accessed Apr. 25, 2022); USCIS News Alert, “USCIS Simplifying, Improving Communication of Case Processing Data” (May 5, 2022); <https://www.uscis.gov/newsroom/news-releases/uscis-simplifying-improving-communication-of-case-processing-data> (accessed May 13, 2022).

<sup>451</sup> Protection for Certain Crime Victims Including Victims of Crimes Against Women, § 1513, Publ. L. No.106-386 (2000).

<sup>452</sup> *Id.*

noncitizens to report crimes and provide law enforcement with the tools necessary to investigate and prosecute criminals, while offering protection to victims and fostering their trust with the law enforcement community.

The statute was amended in 2008 by the TVPRA.<sup>453</sup> TVPRA amended section 214(p)(6) of the INA, the U visa procedures section, by authorizing employment authorization based on a pending, *bona fide* U visa petition.<sup>454</sup> Despite the express authorization to provide U visa applicants with the ability to work while waiting for their *bona fide* application to be adjudicated, no process was established until now. And while the process established in 2021 has had some operational challenges, it has established a high-water mark for operationalizing a statutory authority in the wake of significant oversubscription and years-long waits.

## THE U VISA ADJUDICATION: A LONG, LONG WAIT

Eligibility for U nonimmigrant status requires that a principal petitioner (the victim) have specific, credible, and reliable information about the qualifying crime,<sup>455</sup> and a law enforcement official must certify that the petitioner “was helpful, is being helpful, or will likely be helpful in the investigation or prosecution of the crime.”<sup>456</sup> Law enforcement officials do so by completing Form I-918, Supplement B, *U Nonimmigrant Status Certification*.<sup>457</sup> Cooperation between the petitioner and law enforcement is of great importance because a petitioner cannot move forward with filing for U nonimmigrant status without a signed Form I-918, Supplement B.

Principal petitioners file for U nonimmigrant status by filing with USCIS the Form I-918, *Petition for U Nonimmigrant Status*; Form I-918 Supplement B; Form I-192, *Application for Advance Permission to Enter as Nonimmigrant* (if applicable);<sup>458</sup> a personal statement;

and supporting documentation.<sup>459</sup> Additionally, each qualifying derivative must file their own Form I-918, Supplement A, *Petition for Qualifying Family Member of U-1 Recipient*, either together with the victim’s Form I-918 or after the victim files. USCIS processes and adjudicates these petitions at its service centers in Nebraska and Vermont.<sup>460</sup> Once the appropriate service center receives the petition, USCIS places it in a first in/first out filing order for adjudication.

If USCIS finds the petitioner satisfies all the requirements for U nonimmigrant status and a U visa is available, USCIS may approve the Form I-918 and grant U nonimmigrant status to the petitioner and qualifying derivatives.<sup>461</sup> Under the law, USCIS may approve 10,000 U nonimmigrant status petitions each year.<sup>462</sup> This annual visa cap only applies to petitions filed by principal petitioners, not petitions filed by derivatives.<sup>463</sup>

*Before the creation of the BFD process.* If no visas were available by the time USCIS reviewed the principal petitioner’s Form I-918, USCIS would notify eligible petitioners that they were being placed on the waitlist.<sup>464</sup> While a petitioner was on the waitlist, they received deferred action and employment authorization.<sup>465</sup> USCIS’ goal in creating the waitlist was to “respect the intent of the numerical limitation imposed by Congress while still allowing the legislation to achieve maximum efficacy.”<sup>466</sup> However, as Form I-918 filings began to increase, so did the length of time it took for USCIS to place a case on the waitlist, causing lengthy delays for petitioners once again.

The wait time to be placed on the waitlist has grown exponentially over the years. A review of USCIS’ historical national median processing times for FYs 2017 through 2020 shows a 72 percent increase<sup>467</sup> (31.5 months in FY 2017 to 54.3 months in FY 2020) in the length of time it took USCIS to review Form I-918. By the fourth quarter of FY 2020, the median processing time from when USCIS received a Form I-918 until it placed the form on

<sup>453</sup> Publ. L. 110-457, 122 Stat. 5044 (Dec. 23, 2008).

<sup>454</sup> *Id.*

<sup>455</sup> 8 C.F.R. § 214.14.

<sup>456</sup> *Id.*

<sup>457</sup> Any federal, state, tribal, territorial, or local law enforcement agency, prosecutor, judge, or other authority that detects, investigates, or prosecutes the qualifying criminal activity, or convict or sentence the perpetrator can sign and certify the form. “U Visa Law enforcement Resource Guide;” [https://www.uscis.gov/sites/default/files/document/guides/U\\_Visa\\_Law\\_Enforcement\\_Resource\\_Guide.pdf](https://www.uscis.gov/sites/default/files/document/guides/U_Visa_Law_Enforcement_Resource_Guide.pdf) (accessed Mar. 3, 2022).

<sup>458</sup> Form I-192 is used when the petitioner is inadmissible and is seeking advance permission to temporarily enter the United States as a nonimmigrant. USCIS Web page, “Instructions for Form I-192, *Application for Advance Permission to Enter as a Nonimmigrant*” (May 5, 2022); <https://www.uscis.gov/i-192> (accessed May 18, 2022).

<sup>459</sup> USCIS Web page, “I-918, Petition for U Nonimmigrant Status,” “Checklist of Required Initial Evidence” (Apr. 7, 2022); <https://www.uscis.gov/i-918> (accessed May 17, 2022).

<sup>460</sup> USCIS Web page, “I-918, Petition for U Nonimmigrant Status,” “Where to File” (Apr. 7, 2022); <https://www.uscis.gov/i-918> (accessed Apr. 25, 2022).

<sup>461</sup> 8 C.F.R. § 214.14(c)(5)(i); 8 C.F.R. § 214.14(f)(6).

<sup>462</sup> INA § 214(p)(2); 8 U.S.C. § 1184(p)(2).

<sup>463</sup> INA § 214(p)(2)(B); 8 U.S.C. § 1184(p)(2)(B).

<sup>464</sup> 8 C.F.R. § 214.14(d)(2).

<sup>465</sup> *Id.*

<sup>466</sup> “New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status,” 72 Fed. Reg. 53027 (Sep. 17, 2007).

<sup>467</sup> USCIS Web page, “Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year;” <https://egov.uscis.gov/processing-times/historic-pt> (accessed Apr. 25, 2022).

the waitlist was 50.9 months.<sup>468</sup> These delays resulted in a lack of relief that the waitlist was meant to provide.

## **BFD: FULFILLING A STATUTORY AUTHORIZATION TO HELP COPE WITH A BACKLOG**

On February 2, 2021, President Biden issued an executive order requiring the Department of Homeland Security (DHS) to “identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits and make recommendations on how to remove these barriers, as appropriate and consistent with applicable law.”<sup>469</sup> Soon after, USCIS launched the BFD process as “one of a number of initiatives designed to eliminate complex, costly, and unjustified administrative burdens and barriers, and thus to improve [the] immigration processes.”<sup>470</sup>

Under the BFD process, USCIS conducts an initial review of a pending Form I-918 to see if it is bona fide. After completing background checks, USCIS can use its discretion to grant the petitioner BFD-based employment authorization and deferred action. USCIS will then place the Form I-918 back in the pending case queue based on the receipt date. This means the BFD review can provide relief earlier in the adjudication process than the waitlist review, and if USCIS grants the BFD EAD, the case never goes on the U visa waitlist. Instead, USCIS will review the case again only when a U visa is available.<sup>471</sup>

When USCIS implemented the BFD process, it published corresponding guidance that describes a three-pronged approach for the review of pending Forms I-918.<sup>472</sup> The

first prong is determining whether the Form I-918 petition is bona fide. As it is not defined in the statute, USCIS uses Black’s Law Dictionary to define the term *bona fide*: “made in good faith; without fraud or deceit.”<sup>473</sup> A petition is bona fide if the principal petitioner has properly filed a complete Form I-918, including all required initial evidence, and the petitioner successfully completes the background checks.<sup>474</sup> If all the required forms and initial evidence were properly filed and do not appear to be fraudulent, the petitioner will satisfy the first prong of the BFD review process.

The second prong in the BFD review process is determining whether the petitioner poses a risk to national security or public safety by reviewing the results of background and security checks. USCIS makes this determination based on the petitioner’s criminal history, if one exists, which includes both arrests and convictions.<sup>475</sup> USCIS’ consideration of these risks “aligns with inadmissibility grounds evaluated during the adjudication of a petition for U nonimmigrant status and is therefore a consistent exercise of discretion within the authority afforded by INA 214(p)(6) to grant BFD EADs.”<sup>476</sup>

Where there is a question of whether to exercise its discretion based on an arrest record, USCIS may give the petitioner the opportunity to provide additional documentation related to the arrest or conviction. In cases where additional review is needed, USCIS may issue a request for evidence (RFE) and may decline to make a BFD determination. Further, if USCIS does not grant a petition BFD because of a potential risk the petitioner appears to pose to national security or public safety, USCIS will place the case back in the case queue and determine later whether to place it on the waitlist.<sup>477</sup>

If the petitioner satisfies the first two prongs of the BFD process and USCIS determines that the petitioner warrants a favorable exercise of discretion (the third prong), USCIS will grant the petitioner deferred action and employment authorization under INA 214(p)(6) for an initial period of 4 years. Petitioners who are granted BFD deferred action and employment authorization can expect that USCIS will update and review background checks at regular intervals

<sup>468</sup> USCIS’ Fiscal Year 2021 Report to Congress, “Humanitarian Petitions: U Visa Processing Times,” (Aug. 12, 2021); <https://www.uscis.gov/sites/default/files/document/reports/USCIS-Humanitarian-Petitions.pdf#:~:text=Processing%20times%20for%20the%20U%20program%20have%20increased,waitlist%20placement%20until%20final%20adjudication%20was%2010.0%20months.?msclkid=09a33c7cc73411ec923d2a14e75f9c59> (accessed Apr. 28, 2022).

<sup>469</sup> “Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans;” <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-restoring-faith-in-our-legal-immigration-systems-and-strengthening-integration-and-inclusion-efforts-for-new-americans/> (accessed May 12, 2022).

<sup>470</sup> USCIS News Alert, “USCIS Issues Policy Providing Further Protections for Victims of Crime” (Jun. 14, 2021); <https://www.uscis.gov/newsroom/news-releases/uscis-issues-policy-providing-further-protections-for-victims-of-crime> (accessed Apr. 25, 2022).

<sup>471</sup> USCIS Web page, “I-918, Petition for U Nonimmigrant Status, Questions and Answers: U Status Bona Fide Determination Process” (Apr. 7, 2022); <https://www.uscis.gov/I-918?msclkid=2be9c0b2c72911ecabaef0a4c5116b68> (accessed Apr. 28, 2022).

<sup>472</sup> The guidance is in Volume 3 of the USCIS Policy Manual, which updates and replaces Chapter 39.1(d)(2) and (f) of the Adjudicator’s Field Manual (AFM), as well as the AFM’s related appendices and related policy memoranda.

<sup>473</sup> See 3 USCIS Policy Manual, Pt. C, Ch. 5 n. 3; <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5> (accessed May 30, 2022).

<sup>474</sup> 3 USCIS Policy Manual, Pt. C, Ch. 5 (A)(1); <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5> (accessed May 30, 2022).

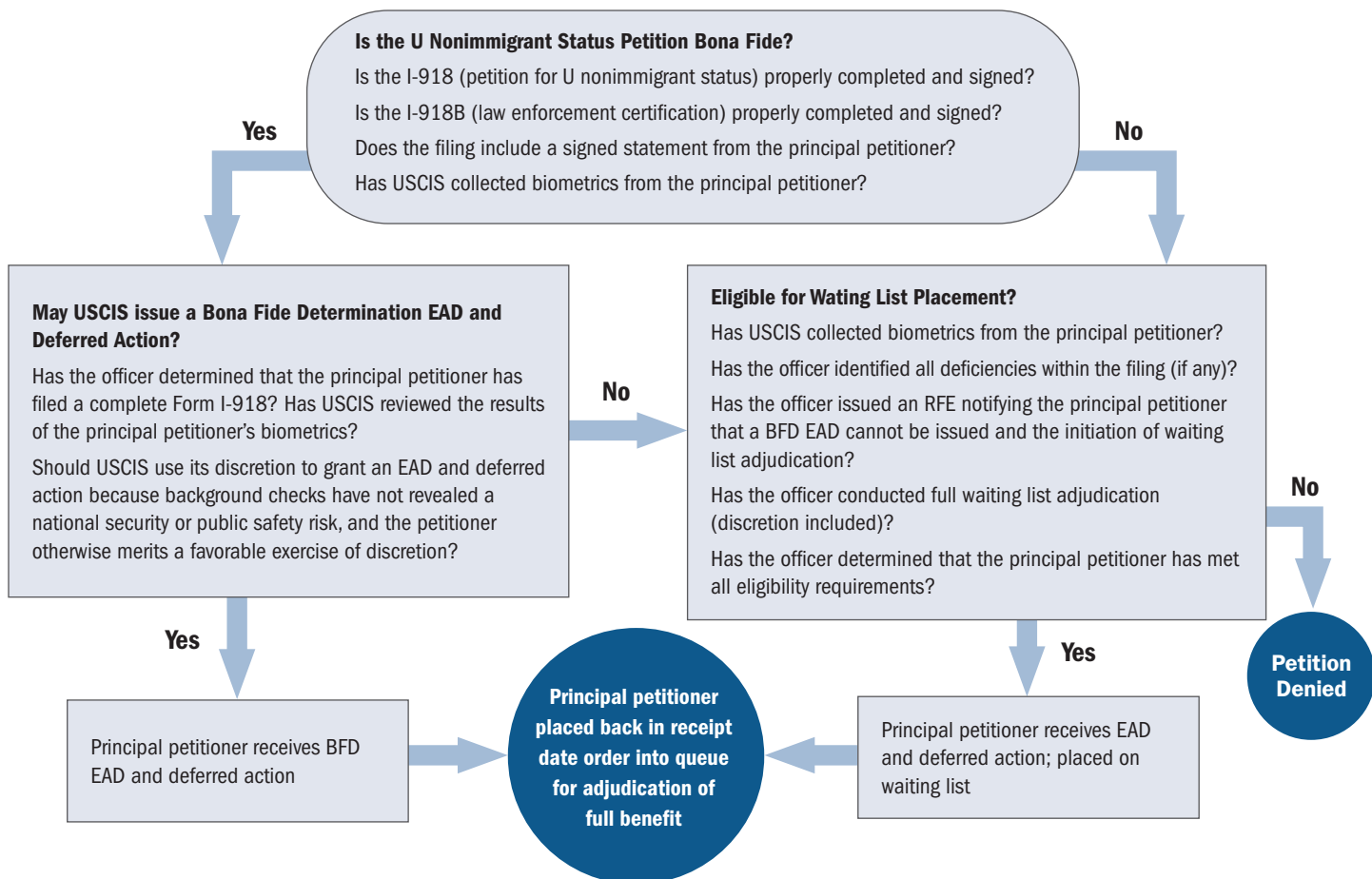
<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*

**Figure 8.1**  
The BFD Process

**Form I-918 filed by principal petitioner living in the United States is received by USCIS.**



Source: USCIS Policy Manual, Pt. C, Ch. 6; <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5> (accessed May 27, 2022).

to determine if they may maintain the BFD EAD and deferred action.<sup>478</sup>

After a principal petitioner is found eligible for a BFD EAD, USCIS will review any pending Form I-918A filed by derivatives. A derivative living in the United States is not guaranteed to receive a BFD EAD and deferred action solely because the principal petitioner was found eligible. The derivative must independently demonstrate their Form

I-918A is bona fide as well.<sup>479</sup> Additionally, USCIS may issue an RFE related to the derivative's Form I-918A even though it has already granted a BFD EAD to the principal petitioner. For example, USCIS may issue an RFE if the derivative did not submit evidence of the qualifying family relationship or if it spots national security or public safety issues.<sup>480</sup> Furthermore, USCIS cannot approve a derivative's Form I-918A for a BFD EAD if it did not approve the principal's Form I-918 for a BFD EAD.

<sup>478</sup> USCIS Policy Alert, "Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners" (Jun. 14, 2021); <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210614-VictimsOfCrimes.pdf> (accessed Apr. 25, 2022).

<sup>479</sup> USCIS Web page, "I-918, Petition for U Nonimmigrant Status, Questions and Answers: U Status Bona Fide Determination Process" (Apr. 7, 2022); <https://www.uscis.gov/I-918?msclkid=2be9c0b2c72911ecabaef0a4c5116b68> (accessed Apr. 28, 2022).

<sup>480</sup> Information provided by USCIS (Apr. 29, 2022).

The BFD review process is conducted by immigration services officers (ISOs) on a specialized U visa team at the Vermont and Nebraska Service Centers. ISOs assigned to the BFD team receive specialized training on the BFD process. Additionally, ISOs' decisions are reviewed regularly by management as part of center quality procedures.<sup>481</sup> ISOs have been instructed to conduct a BFD review for all "untouched" cases, which means a case already on the waitlist will not get a BFD review.<sup>482</sup> If the petition is found eligible for a BFD EAD and there is a Form I-765 readily available in the file, USCIS will issue the petitioner an EAD within 4 days.<sup>483</sup> However, if no Form I-765 is in the file, USCIS will take longer to issue the BFD EAD.

An initial BFD EAD grant will not automate nor guarantee future renewals.<sup>484</sup> Nor will it guarantee the ultimate review for the U visa. USCIS reserves to itself the right to revoke employment authorization or terminate deferred action at any point if it determines a national security or public safety concern is present, the BFD EAD and deferred action is no longer warranted, the Form I-918 Supplement B law enforcement certification is withdrawn, or the prior BFD EAD was issued in error.<sup>485</sup> An initial grant or renewal of a BFD EAD and deferred action will not guarantee approval of the principal petitioner (or qualifying family members) for the U visa. Eligibility for U nonimmigrant status, according to USCIS, does not include consideration of prior grants or renewals of the BFD EAD or deferred action.<sup>486</sup>

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## PETITIONERS AND DERIVATIVES EXPERIENCE A FEW BUMPS IN THE LAUNCH

The BFD process has been a welcome relief for petitioners<sup>487</sup> despite certain issues that occurred during the initial rollout of the process. For example, a lack of clear guidance resulted in the erroneous rejection of some subsequently-filed BFD-related Forms I-765. Generally, there is no fee required to file certain victim-based and humanitarian benefit requests, including Form I-918, and the initial Form

I-765 for a BFD EAD.<sup>488</sup> However, after USCIS announced the implementation of the BFD process, some petitioners who subsequently submitted a Form I-765 for a BFD EAD were rejected for failing to submit a filing fee. USCIS also accepted unnecessary filing fees for other BFD-related Forms I-765. Since then, USCIS has been proactive in resolving these issues by providing clear guidance on when and how to file a BFD-related Form I-765.<sup>489</sup>

Certain petitioners for U nonimmigrant status are also eligible for deferred action under a different policy (i.e., Deferred Action for Childhood Arrivals (DACA)). During the BFD's initial rollout, some petitioners experienced difficulties when renewing a DACA grant and DACA-related employment authorization after being granted BFD deferred action and BFD EAD. When refusing to renew DACA for this reason, USCIS explained that such refusals were due to the fact that USCIS had already "deferred action" on the requestor's case.<sup>490</sup> However, USCIS has since addressed this matter and is not refusing DACA on this ground, though it has not issued formal policy or guidance on this matter.

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## LENGTHY PROCESSING TIMES REMAIN UNRESOLVED

As of May 2022, the Vermont and Nebraska Service Centers were processing 80 percent of Form I-918 cases within 61.5 months—just over 5 years.<sup>491</sup> USCIS, however, specifies that the 61.5 month range "does not reflect the current processing times from initial receipt to the final issuance of the U nonimmigrant status."<sup>492</sup> Instead, the time range reflects the time from when USCIS issues a receipt for Form I-918 to either the issuance of a BFD notice or a notice that USCIS is considering the petition for the waitlist, not for the complete adjudication of a U petition. As of December 31, 2021, USCIS had issued 9,863 BFD EADs and had 141,231 pending Forms

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<sup>481</sup> *Id.*

<sup>482</sup> *Id.*

<sup>483</sup> *Id.*

<sup>484</sup> 3 USCIS Policy Manual, Pt. C, Ch. 6; <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5> (accessed May 27, 2022).

<sup>485</sup> *Id.*

<sup>486</sup> *Id.*

<sup>487</sup> Information received from stakeholders (Jan. 27, 2022 and Feb. 1, 2022).

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<sup>488</sup> USCIS Web page, "U Nonimmigrant Status Bona Fide Determination Process FAQs" (Sep. 23, 2021); <https://www.uscis.gov/records/electronic-reading-room/u-nonimmigrant-status-bona-fide-determination-process-faqs> (accessed May 18, 2022).

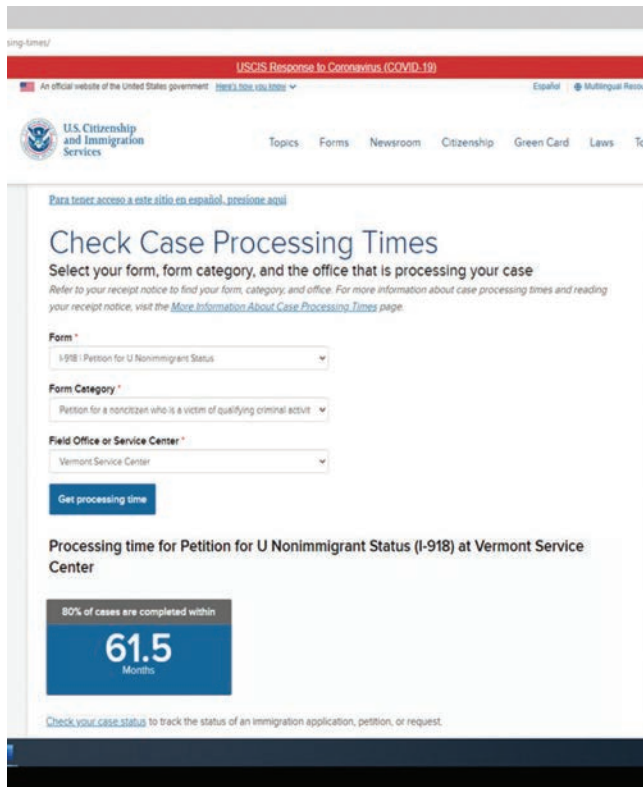
<sup>489</sup> USCIS Alert, "USCIS mistakenly rejected bona-fide-determination-related Forms I-765, Application for Employment Authorization, submitted without a fee or fee waiver from June 14 through Sept. 29, 2021. We may have accepted other Forms I-765 with an unnecessary fee" (Apr. 7, 2022); <https://www.uscis.gov/I-918?msclkid=2be9c0b2c72911ecabaef0a4c5116b68> (accessed on May 18, 2022).

<sup>490</sup> Stakeholders reported USCIS erroneously denied renewal of Form I-821D, *Consideration of Deferred Action for Childhood Arrivals*, and associated Forms I-765 when it had granted BFD for a pending Form I-918 to the same applicant.

<sup>491</sup> USCIS Web page, "Processing time for Petition for U Nonimmigrant Status (I-918) at Vermont Service Center;" <https://egov.uscis.gov/processing-times/> (accessed May 12, 2022).

<sup>492</sup> *Id.*

I-918 waiting to undergo BFD review.<sup>493</sup> Although there are no posted processing times for Form I-918A, USCIS reported that there were 98,498 Forms I-918A waiting for BFD review as of December 31, 2021, and that it would take approximately 59.6 months to review a pending Form I-918A for BFD.<sup>494</sup> That time has only grown, as evidenced by this May 2022 screenshot from the USCIS “Check Case Processing Times” Web page for Form I-918:



Currently, a Form I-918 is outside of normal processing times if USCIS does not assess it for a BFD in 61.5 months. USCIS anticipated that the BFD process would “reduce the amount of time that U visa petitioners living in the United States wait before receiving an initial adjudicative decision from USCIS and will provide critical benefits to victims with pending bona fide U visa petitions.”<sup>495</sup> However, because so many petitions have been filed in the last few years, it will take time to work down the significant inventory. Since 2009, the number of I-918 petitions USCIS has receipted every year have significantly increased. USCIS received 62,990

<sup>493</sup> Information provided by USCIS (Apr. 29, 2022).

<sup>494</sup> *Id.*

<sup>495</sup> USCIS’ Fiscal Year 2021 Report to Congress, “Humanitarian Petitions: U Visa Processing Times,” (Aug. 12, 2021); <https://www.uscis.gov/sites/default/files/document/reports/USCIS-Humanitarian-Petitions.pdf#:~:text=Processing%20times%20for%20the%20U%20program%20have%20increased,waitlist%20placement%20until%20final%20adjudication%20was%2010.0%20months.?msclid=09a33c7cc73411ec923d2a14e75f9c59> (accessed Apr. 28, 2022).

I-918/I-918As in fiscal year 2017 alone, bringing the inventory of pending petitions to 192,243.<sup>496</sup> Since 2017, the number of petitions filed each year have continued to exceed the 10,000 visas available for U nonimmigrant visa petitions and as of the first quarter of 2022, there are 286,504 I-918/I-918A waiting a decision.<sup>497</sup> During the first 6 months of the BFD process implementation, USCIS reviewed 22,799 pending I-918/I-918A petitions and granted BFD to 17,790 of those petitions.<sup>498</sup> Although having posted processing times is important to determine case status, petitioners will continue to wait on resolution of their cases for a long time.<sup>499</sup>

The U program itself, however, remains under scrutiny. The DHS Office of the Inspector General (DHS OIG) conducted an audit of the U nonimmigrant visa program in 2021 and issued a report of its findings along with recommendations for improvements to USCIS on January 6, 2022.<sup>500</sup> In its report, the DHS OIG recommended that USCIS:

- i. Implement additional controls that mitigate risks of fraudulent Supplement B forms, such as requiring certifying officials to submit forms directly to USCIS.
- ii. Improve USCIS data systems to ensure accurate reporting of U visas granted.
- iii. Develop a plan to track the outcome of U visa-related fraud referrals and take steps to further mitigate fraud risk.
- iv. Take steps to timely protect eligible petitioners awaiting initial adjudication due to the backlog.
- v. Enhance performance metrics to ensure the program achieves its purpose.

In response to the DHS OIG’s report, USCIS noted that there was a “fundamental misinterpretation by OIG of U visa statutes, regulations, and policies” which led it to disagree with two of the recommendations while

<sup>496</sup> USCIS Web page, “Number of Form I-918 Petition for U Nonimmigrant Status by Fiscal Year, Quarter and Status Fiscal Years 2009–2022” [https://www.uscis.gov/sites/default/files/document/reports/I918u\\_visastatistics\\_fy2022\\_qtr1.pdf](https://www.uscis.gov/sites/default/files/document/reports/I918u_visastatistics_fy2022_qtr1.pdf) (accessed on May 13, 2022).

<sup>497</sup> *Id.*

<sup>498</sup> *Id.*

<sup>499</sup> USCIS did not announce a processing time goal for Form I-918 in its list of goals for FY 23. USCIS Web Alert, “USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders” (Mar. 29, 2022); <https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work> (accessed May 14, 2022).

<sup>500</sup> DHS OIG, “USCIS’ U Visa Program is Not Managed Effectively and is Susceptible to Fraud,” OIG-22-10 (Jan. 2022); <https://www.oig.dhs.gov/reports/2022/uscis-u-visa-program-not-managed-effectively-and-susceptible-fraud-redacted/oig-22-10-jan22-redacted> (accessed on May 13, 2022).

concurring with three.<sup>501</sup> USCIS disagreed with one recommendation regarding implementation of additional controls to mitigate risks of fraudulent Supplement B forms because USCIS “ha[s] already implemented robust controls to mitigate fraud risk.”<sup>502</sup> Additionally, USCIS disagreed with the recommendation to develop a tracking mechanism for fraud referrals. In its response, USCIS explains that “the outcome of investigations, prosecutions, and fraud referrals is outside of USCIS’ role in providing immigration benefits.”<sup>503</sup> Although the DHS OIG’s investigation focused on the U visa program and did not include the BFD process (which had not been developed during the time period of the OIG audit), in their response, USCIS highlights the BFD as a process that improves the administration of the U nonimmigrant visa program.

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## **BRIGHTER FUTURE FOR VICTIMS OF CRIMES?**

The BFD process is a significant step toward mitigating a significant pain point for the U petitioner population; the nearly 7 percent of petitioners who have already received a BFD EAD and deferred action<sup>504</sup> would likely concur. Although the BFD process was years in the making, petitioners and advocates remain cautiously optimistic that the BFD process will enable more victims of crime whose U petitions are determined to be bona fide to obtain work authorization and protection from removal, fulfilling Congress’ intent to avoid further victimization of these individuals.

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<sup>501</sup> DHS OIG, “USCIS’ U Visa Program is Not Managed Effectively and is Susceptible to Fraud,” Appendix D.

<sup>502</sup> *Id.*

<sup>503</sup> DHS OIG, “USCIS’ U Visa Program is Not Managed Effectively and is Susceptible to Fraud,” p. 16.

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<sup>504</sup> USCIS Web page, “Number of Form I-918 Petition for U Nonimmigrant Status by Fiscal Year, Quarter and Status Fiscal Years 2009–2022;” [https://www.uscis.gov/sites/default/files/document/reports/I918u\\_visastatistics\\_fy2022\\_qtr1.pdf](https://www.uscis.gov/sites/default/files/document/reports/I918u_visastatistics_fy2022_qtr1.pdf) (accessed on May 13, 2022).



# PREVIOUSLY RELEASED RECOMMENDATIONS

## ADDRESSING THE CHALLENGES OF THE CURRENT USCIS FEE-SETTING STRUCTURE

U.S. Citizenship and Immigration Services (USCIS) needs financial stability and flexibility to administer the nation's immigration benefits system and provide predictable, accurate, and timely service. The agency's current fee-for-service funding model does not fully equip the agency to meet these goals, placing the immigration benefits system at risk of systemic failure. To address this issue, the CIS Ombudsman issued a recommendation on June 15, 2022.

### USCIS' CURRENT FEE-FOR-SERVICE FUNDING MODEL

Approximately 97 percent of USCIS' more than \$4 billion annual budget is funded by filing fees. Under the law, USCIS must set fees that ensure it can recover the full operating costs of the services it provides. Yet, some forms do not have a fee, have capped fees, or come with fee waivers. To cover these costs, USCIS adds a surcharge to other forms.

USCIS follows the Administrative Procedure Act (APA) rulemaking process to set its fees.<sup>505</sup> The process is slow and involves many steps, including a fee review study and a public comment period. When USCIS published its latest final fee rule on August 3, 2020,<sup>506</sup> the entire process had taken approximately 2.5 years.<sup>507</sup> Much of the information on completion times, costs, staffing, and payroll was more than 2 years old. Furthermore, a U.S. District Court enjoined the final rule from being implemented.<sup>508</sup> As a result, USCIS continues to accept

filing fees based on the previous 2016 Fee Rule, essentially providing services at below cost.<sup>509</sup>

### USCIS STAFFING MODELS REFLECT THE COST OF FUTURE BENEFIT FILINGS, BUT NOT BACKLOGS

When determining whether its fees are sufficient, USCIS considers employee staffing, workload volume, adjudication completion rates, and utilization rates for each immigration benefits. In 2021, the Government Accountability Office (GAO) expressed concern that USCIS' Staffing Allocation Models (SAMs) assume all authorized full-time positions are filled on the first day of the fiscal year, and all employees remain fully productive throughout the year. This assumption does not comport with federal hiring practices and staffing and attrition patterns. In FY 2020, USCIS took an average of 97 to 118 days to onboard a new adjudicator after a hiring decision.<sup>510</sup> It then takes approximately 102 days for them to begin 6 weeks of basic immigration training.<sup>511</sup> USCIS directorates also do not have a methodology for assessing how hiring delays and attrition affect its staffing models.

Equally important, the SAMs estimate the cost of adjudicating *future* benefit filings only; they do not estimate the costs to reduce backlogs or processing times because USCIS has already collected fees for those cases. Given that the agency consistently misses target processing times, it is unclear why USCIS has not yet developed a way to include these important factors into its staffing models.

### THE IMPACT OF POLICY SHIFTS AND CHANGING PRIORITIES ON FEES

USCIS frequently implements directives from all three branches of government without receiving funding to cover the impacts on its operations and financial health. USCIS often must reassign employees from one product line to another, which can temporarily stop or slow adjudications, increase the number of requests for evidence issued, and grow backlogs. Although USCIS does ad-hoc modeling to

<sup>505</sup> Although the Secretary of Homeland Security issues the rule, this article refers to USCIS as the rulemaking component because it generally conducts the fee study, drafts the rule, and does the various other rulemaking tasks.

<sup>506</sup> "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 85 Fed. Reg. 46788 (Aug. 3, 2020).

<sup>507</sup> Information provided by USCIS (Mar. 9, 2022).

<sup>508</sup> *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 549 (N.D. Cal. 2020).

<sup>509</sup> USCIS conducted a comprehensive biennial fee review and determined that current fees do not recover the full costs of providing services. "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 85 Fed. Reg. 46788.

<sup>510</sup> Information provided by USCIS (Mar. 9, 2022).

<sup>511</sup> *Id.* Asylum officers undergo an additional 6 months of training.

assess changes to completion rates, it cannot estimate the cost impact for individual policy changes<sup>512</sup> and its SAMs do not adequately factor in known or foreseeable changes in policy, practice, or operations.

## THE IMPACT OF HUMANITARIAN EMERGENCIES ON USCIS SERVICES MUST ALSO BE CONSIDERED

It is also generally not possible to anticipate many humanitarian emergencies. Examples include:

- *The waves of migrants seeking asylum at the U.S. Southern border.* From FY 2015 through June 2020, a total of 1,882 detainees rotated through the region to conduct credible fear and reasonable fear screenings,<sup>513</sup> taking them away from affirmative asylum adjudications work. This contributed to the excessively large asylum backlog.
- *The Secretary of Homeland Security designating new countries for TPS.* There is no room in the agency's fee-for-service funding model to provide the additional resources it needs to adjudicate thousands of new TPS cases.
- *The current USCIS effort to implement the DHS-wide "Uniting for Ukraine" initiative.* Given the unforeseeable impact of a war not yet initiated, these specific efforts were unanticipated at the beginning of this fiscal year, much less at the last fee-setting exercise.
- *The 2017 rescission<sup>514</sup> of the agency's deference policy.*<sup>515</sup> The rescission decision led directly to significant spikes in RFEs and denials between FY 2016 and 2018 while case completion rates fell.<sup>516</sup> Although this result was entirely predictable, it was not accounted for when USCIS set the filing fees for processing these petitions.

<sup>512</sup> Information provided by USCIS (Oct. 13, 2021).

<sup>513</sup> *Id.*

<sup>514</sup> USCIS Policy Memorandum, "Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility" (Oct. 23, 2017); <https://www.uscis.gov/sites/default/files/document/memos/2017-10-23-Rescission-of-Deference-PM602-0151.pdf> (accessed Feb. 8, 2022).

<sup>515</sup> USCIS Interoffice Memorandum, "The Significance of a Prior CIS Approval of a Nonimmigrant Petition" (Apr. 23, 2004); <https://www.hsdl.org/?view&did=20258> (accessed Feb. 8, 2022).

<sup>516</sup> Analysis of USCIS data by the CIS Ombudsman. Composite Form I-129 RFE rates for H-1B specialty occupation workers increased approximately 18 percent. Aggregate denial rates for all temporary worker categories during this same timeframe increased 26 percent, and completion rates fell 33 percent. (FY 2018 was the first full year that the "no deference" policy was in place.) See "USCIS Immigration and Citizenship Data, Nonimmigrant Worker Petitions by Case Status and Request for Evidence (RFE) Fiscal Year 2021, 4th Quarter, October 1, 2015-September 30, 2021;" [https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data?ddt\\_mon=&ddt\\_yr=&query=RFE&items\\_per\\_page=10](https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data?ddt_mon=&ddt_yr=&query=RFE&items_per_page=10) (accessed Jun. 1, 2022).

## UNLIKE STATE AND HHS, USCIS DOES NOT RECEIVE FUNDING FOR ITS HUMANITARIAN PROGRAMS

In FY 2021, the State Department received over \$2 billion and the Department of Health and Human Services (HHS) received almost \$3 billion for Operations Allies Welcome (OAW) assistance to Afghan nationals.<sup>517</sup> While USCIS also received OAW funding, USCIS otherwise has not received appropriations to support its humanitarian programs since FY 2011.<sup>518</sup> Instead, the costs of USCIS' humanitarian programs are shouldered almost entirely by its fee-paying customers.<sup>519</sup> In FY 2021 alone, no-fee or fee-capped humanitarian-based filings cost approximately \$330 million. During the ten-year period of FY 2010 through FY 2020, USCIS' humanitarian programs cost \$2.7 billion.<sup>520</sup> While this is a policy choice for Congress, it is worth reexamining how much of the cost burden of USCIS' humanitarian programs its customers should bear, and whether the costs should be funded as it is for these other agencies.

## RECONSIDERING THE IMPLEMENTATION OF AUTOMATIC FEE ADJUSTMENTS BASED ON INFLATION

USCIS has had the authority to adjust its user fees every year to keep pace with inflation. USCIS could make these adjustments based on a "composition of the Federal civilian pay-raise assumption and non-pay inflation factor for that fiscal year" as issued by the Office of Management and Budget (OMB).<sup>521</sup> It could modify fees to supplement established fees by issuing an annual notice in the Federal Register. USCIS and its predecessor, the Immigration and Naturalization Service, adjusted fees based on this authority multiple times: in 1994, 2002, 2004, with the last use of this authority in 2005.<sup>522</sup>

USCIS should resume use of this authority to keep pace with inflation for both payroll and non-payroll expenses. If USCIS had made these adjustments annually for the last

<sup>517</sup> Extending Government Funding and Delivering Emergency Assistance Act, Title III, Pub. L. No. 117-43 (2021); Further Extending Government Funding Act, Title III Pub. L. No. 117-70 (2021).

<sup>518</sup> Information provided by USCIS (Oct. 13, 2021).

<sup>519</sup> Congress did appropriate funds to USCIS prior to 2010 to support the country's humanitarian programs.

<sup>520</sup> Information provided by USCIS (May 12, 2022).

<sup>521</sup> OMB Circular No. A-76 (Revised), Attachment C, "Calculating Public-Private Competition Costs" (May 29, 2003); [https://www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/circulars/A76/a76\\_incl\\_tech\\_correction.pdf](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A76/a76_incl_tech_correction.pdf) (accessed Mar. 29, 2022).

<sup>522</sup> See "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," 84 Fed. Reg. 62280, 62284-85 (Nov. 14, 2019).

6 years, fee revenue would have increased by 8.9 percent. The additional revenues would have: (1) reduced its current operating deficit (estimated to be over \$1 billion annually); (2) provided greater flexibility to meet unanticipated demands; and (3) helped mitigate the sticker shock of large fee increases.

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## RECOMMENDATIONS

The CIS Ombudsman recommended that USCIS:

1. Reengineer the agency's biennial fee review process and associated staffing models to ensure they fully and proactively project the amounts needed to meet targeted processing time goals for future processing as well as backlog adjudications. The agency's current SAMs and resulting staffing projections must give USCIS staff the time needed to thoroughly review all filings to make quality decisions without sacrificing national security or benefit integrity. Having the right number of staff and ensuring that they receive the robust training they need must be one of the agency's highest priorities.
2. Seek public appropriations to cover the cost of delivering humanitarian-based immigration benefits (including but not limited to USCIS' refugee and asylum programs). Doing so places USCIS on the same footing as the State Department and HHS without having to seek money from other applicants by adding premiums to their processing fees.
3. Consider seeking congressional authority to establish a new financing stream through the Department of the Treasury's Federal Financing Bank<sup>523</sup> or through some other mechanism to draw upon as needed, and at its discretion. This would essentially be a line of credit to help USCIS meet the dynamic nature of its operations and make adjustments to address irregular receipt revenues due to unplanned circumstances and mandates placed on it by Congress, the courts, or the administration.<sup>524</sup> The agency would need to repay/replenish the amount borrowed with a portion of the filing fee revenues it collects. If fee receipt revenues prove inadequate to repay loaned funds, USCIS would be required to factor repayment into the next fee rule. While this pathway would require

extended discussions and understandings between the Department of Homeland Security, OMB, and the Department of the Treasury, evening out the agency's cashflow would allow USCIS to pivot quickly to address unexpected events and engage in long-term planning and hiring.

4. Request annual appropriations specifically dedicated to eliminating backlogs. The agency received \$275 million in FY 2022 to contend with backlogs and delays, support the refugee program, and invest in enterprise infrastructure improvements.<sup>525</sup> Continuing such non-revenue funding would allow the agency to hire enough adjudicators to reduce the backlog to acceptable levels, including through term-limited hiring. Publicly funding this effort would ensure that new customers are not burdened with a future surcharge to cover the cost of adjudicating backlogged filings.
5. Resume using its authority to adjust fees annually based on the salary/inflation factor calculated by OMB under Circular A-76. Using this mechanism to adjust non-statutory fees would enable the agency to at least keep pace with the inflationary cost increases it is now absorbing in the years between fee rules. As a complement to the current biennial fee-setting process, it would provide much-needed real-time increases to cover rising costs and may also decrease the need to make drastic fee increases.

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<sup>523</sup> Congress created the Federal Financing Bank (FFB) in 1973 and, among other things, gave it "the authority to purchase any obligation issued, sold, or guaranteed by a Federal agency." See Federal Financing Bank Web page, "About the FFB;" <https://ffb.treasury.gov/about> (accessed May 18, 2022).

<sup>524</sup> USCIS Response to the CIS Ombudsman's Annual Report 2007, p. 2; <https://www.dhs.gov/xlibrary/assets/USCIS-Response-Ombudsman-06-Report-May-2007.pdf> (accessed Feb. 8, 2022).

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<sup>525</sup> Extending Government Funding and Delivering Emergency Assistance Act, § 132, Pub. L. No. 117-43; Consolidated Appropriations Act, 2022, Title IV, Pub. L. No. 117-103 (2022); DHS, "Detailed Review of the Fiscal Year 2022 Omnibus," p. 4 (Mar. 28, 2022).

## IMPROVING USCIS' FORM I-129 NOTIFICATION PROCEDURES

USCIS does not provide notice to sponsored beneficiaries of actions taken regarding their status. Federal law requires nonimmigrants to be issued proof of status<sup>526</sup> and subjects them to potential immigration consequences and criminal penalties for failing to keep status documentation with them at all times.<sup>527</sup> Current USCIS procedures do not, however, provide beneficiaries sponsored by petitioners and identified on Form I-129, *Petition for a Nonimmigrant Worker*, with notice of actions taken.<sup>528</sup> Rather, USCIS sends all notices relevant to the petition only to the petitioning employers or agents and, if applicable, to their legal representatives. Therefore, beneficiaries must rely on employers for all information regarding the petition, including their own status documentation. Noncitizen workers and their advocates have expressed concern that the failure to directly notify the beneficiaries of actions taken on the petition may leave them without status documentation, rendering them noncompliant with the law, susceptible to abuse by employers, and unable to access benefits requiring proof of status. To address this issue, the CIS Ombudsman issued a recommendation on March 31, 2022.

### ADMINISTRATIVE EFFICIENCY AT THE EXPENSE OF EQUITY

*Regulatory and processing changes led to a lack of documentation for beneficiaries.* Under current regulations, the employer files Form I-129. USCIS often makes two separate determinations when adjudicating it. The first determination involves the petitioner and beneficiary meeting the eligibility requirements for the requested nonimmigrant classification (eligibility request). The second determination includes the beneficiary's extension of stay or change of status request (status request). Although the latter directly concerns the

beneficiary's legal status, USCIS provides notices of action and adverse decisions only to the petitioner.<sup>529</sup>

Before 1991, nonimmigrants were responsible for filing their own status requests and therefore received notification.<sup>530</sup> After the Immigration Act of 1990 passed, USCIS' predecessor agency, the Immigration and Naturalization Service (INS), amended Form I-129 to consolidate the eligibility and status requests into one form and revised the regulations to deal directly with the employer.<sup>531</sup> This change eliminated direct notification to the beneficiary,<sup>532</sup> but lack of documentation does not mean lack of status.

*The agency combined two processes into one.* The regulations continue to recognize the material distinction between the eligibility request and the status request,<sup>533</sup> but USCIS' notification procedures do not. Once the petitioner files Form I-129, certain beneficiaries can continue working after their authorized period of stay expires and/or begin working for a new employer prior to approval.<sup>534</sup> Because USCIS sends a receipt notice to the employer and/or attorney, beneficiaries must rely on their employer to confirm that the petition was properly filed and that they still have work authorization. If a prospective employer cannot obtain status documents from the beneficiary's current employer, the beneficiary/employer may be prevented from using portability provisions.

While this streamlined process created agency efficiency, it did not change the employee's obligation to maintain lawful status,<sup>535</sup> avoid unauthorized employment,<sup>536</sup> or carry proof of legal status.<sup>537</sup> A denial typically leaves beneficiaries without lawful immigration status and may ultimately affect their ability to remain in or return to the United States.<sup>538</sup> Despite these significant legal implications, USCIS does not provide this documentation

<sup>526</sup> The Immigration and Nationality Act (INA) § 264(d); 8 U.S.C. § 1304(d).

<sup>527</sup> INA § 264(e); 8 U.S.C. § 1304(e); see also 8 C.F.R. § 214.2(h)(18).

<sup>528</sup> On August 18, 2021 and February 15, 2022, USCIS published Federal Register notices requesting public comment on its plan to separate Form I-129 into several individual forms. The proposed revisions are not final and do not alter USCIS' current notification procedures. See 86 Fed. Reg. 46260 (Aug. 18, 2021); 87 Fed. Reg. 8599 (Feb. 15, 2022); and 87 Fed. Reg. 8601 (Feb. 15, 2022).

<sup>529</sup> USCIS uses numerous types of Form I-797, *Notice of Action*, to communicate with the petitioner or convey an immigration benefit. See USCIS Web page, "Form I-797: Types and Function" (Jan. 12, 2021); <https://www.uscis.gov/forms/filing-guidance/form-i-797-types-and-functions> (accessed Mar. 23, 2022).

<sup>530</sup> "A new approval notice shall be issued to the petitioner at the same time that the beneficiary is notified that his or her extension of stay application has been approved." 8 C.F.R. § 214.2(h)(13) (1991). See also 8 C.F.R. § 248.3(d) (1993).

<sup>531</sup> "Information Collections Under Review," 56 Fed. Reg. 50349 (Oct. 4, 1991), and "Changes in Processing Procedures for Certain Applications and Petitions for Immigration Benefits," 59 Fed. Reg. 1455 (Jan. 11, 1994).

<sup>532</sup> "Information Collections Under Review," 56 Fed. Reg. at 50350.

<sup>533</sup> 8 C.F.R. § 274a.12(b)(20) and 8 C.F.R. §§ 214.2(h)(15)(i), (l)(15)(i), (o)(12)(i), and (p)(14)(i).

<sup>534</sup> INA § 214(n); 8 U.S.C. § 1184(n); see also 8 C.F.R. §§ 214.2(h)(2)(i)(H).

<sup>535</sup> INA § 237(a)(1)(C)(i); 8 U.S.C. § 1227(a)(1)(C)(i).

<sup>536</sup> 8 C.F.R. § 214.1(e); see also INA §§ 245(c)(2), (c)(8); 8 U.S.C. §§ 1255(c)(2), (c)(8).

<sup>537</sup> INA § 264(e); 8 U.S.C. § 1304(e).

<sup>538</sup> See INA § 212(a)(9)(B); 8 U.S.C. § 1182(a)(9)(B).

directly to beneficiaries; there is also no process in place to ensure that employees actually receive this documentation from their employers.

## USCIS' CURRENT RELIANCE ON EMPLOYERS TO DELIVER STATUS DOCUMENTATION LEAVES NONCITIZEN WORKERS SUSCEPTIBLE TO ABUSE

*The lack of direct notification/documentation leaves workers vulnerable.* While employers are subject to criminal penalties if they destroy, conceal, or confiscate workers' immigration documents, USCIS does not sanction employers who fail to provide the beneficiary with notices.<sup>539</sup> Without a receipt notice, the beneficiary cannot inquire about the status of the petition; without further protections, the beneficiary is at risk of exploitation.<sup>540</sup>

Withholding status documentation is one of the most common methods of coercion used by human traffickers to control their victims.<sup>541</sup> USCIS' current notification procedures may inadvertently enable unscrupulous employers to exploit noncitizen workers, creating a situation that is ripe for labor trafficking. The proliferation of third-party arrangements and labor contractors has also resulted in additional vulnerabilities.<sup>542</sup> In these arrangements, nonimmigrant employees are typically placed at third-party worksites and frequently may be moved to new work locations, which often requires the filing of a new petition for the beneficiary to maintain status. A subset of these employers and labor contractors may misuse visa programs to exploit workers by falsifying documents and deceiving workers about the terms and conditions of proposed employment. Because they lack

the proper documentation, noncitizen workers may fear reporting program violations.<sup>543</sup>

## USCIS' CURRENT NOTIFICATION PROCEDURES CREATE UNNECESSARY BARRIERS AND INHIBIT EFFICIENCY IN THE AGENCY'S VERIFICATION PROGRAMS

*Status documentation is a necessity to the beneficiary.* Beneficiaries use Form I-94, *Arrival/Departure Record*, to complete Form I-9, *Employment Eligibility Verification*, and as evidence of their immigration status for certain benefits.<sup>544</sup> For employers who use E-Verify, USCIS uses Form I-94 information to confirm employment authorization of certain employees.<sup>545</sup> USCIS can also use Form I-94 information to verify the immigration status of individuals who apply for benefits with federal, state, and local benefit-granting agencies authorized to use USCIS' Systematic Alien Verification for Entitlements (SAVE) program.<sup>546</sup> Some examples include: the Social Security Administration, departments of motor vehicles, and public assistance agencies.

The viability of these verification programs depends on whether individuals can present appropriate evidence of their immigration status and employment eligibility.<sup>547</sup> Beneficiaries must show they are eligible for employment or various public benefits (such as a driver's license, health insurance, social security card, etc.); however, they cannot comply if employers withhold the necessary documentation. The beneficiary's lack of direct access to Form I-94 creates inefficiencies in USCIS' verification programs. In addition, consistent with Executive Order 14012, the CIS Ombudsman has identified USCIS' current notification procedures as a barrier that prevents noncitizen

<sup>539</sup> 18 U.S.C. § 1592. Form I-797A states that the employer "should" provide the lower portion of the approval notice (I-94) to the employee; however, this is not the same as a legal requirement. Notably, USCIS' M-274, *Handbook for Employers* states, "You must give your employee the Form I-94, which is evidence of their employment-authorized nonimmigrant status." USCIS Web page, "6.7 Extensions of Stay or Other Nonimmigrant Categories" (Feb. 16, 2022); <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/60-evidence-of-status-for-certain-categories/67-extensions-of-stay-for-other-nonimmigrant-categories> (accessed Mar. 23, 2022).

<sup>540</sup> See, e.g., *Reyes-Trujillo v. Four Star Greenhouse, Inc.*, 513 F. Supp. 3d 761, 775 (E.D. Mich. 2021)(H-2A workers were moved among employers without notice that their statuses were being amended via the filing of Form I-129).

<sup>541</sup> See Feehs & Currier Wheeler, "2020 Federal Human Trafficking Report," Human Trafficking Institute (Jun. 8, 2021); <https://traffickinginstitute.org/federal-human-trafficking-report/> (accessed Mar. 23, 2022).

<sup>542</sup> "[W]orkers who work for employers other than those who petitioned for them may fear deportation and be more likely to tolerate poor working conditions or abusive situations." U.S. Government Accountability Office, "H-2A and H-2B Visa Program Increased Protections Needed for Foreign Workers," GAO-15-154 (Mar. 2015), p. 31; <https://www.gao.gov/assets/670/669047.pdf> (accessed Mar. 23, 2022).

<sup>543</sup> As directed by DHS Secretary Alejandro Mayorkas, USCIS must develop plans to alleviate or mitigate the fear that labor trafficking victims or witnesses may have regarding cooperating with law enforcement in the investigation and prosecution of unscrupulous employers. See DHS Memorandum, "Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual" (Oct. 12, 2021); [https://www.dhs.gov/sites/default/files/publications/memo\\_from\\_secretary\\_mayorkas\\_on\\_worksite\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf) (accessed Jan. 12, 2022). Providing Form I-129 notices directly to beneficiaries can help mitigate this fear.

<sup>544</sup> People can use a foreign passport accompanied by a Form I-94 to complete Form I-9. Form I-94 can be "any printout or electronic transmission of information from DHS systems containing the electronic record of admission or arrival/departure." 8 C.F.R. § 1.4(d).

<sup>545</sup> See USCIS Web page, "Learn More About E-Verify and myE-Verify;" <http://www.uscis.gov/e-verify> (accessed Aug. 10, 2021).

<sup>546</sup> See USCIS Web page, "Electronic Immigration Status Verification;" <http://www.uscis.gov/save> (accessed Aug. 10, 2021).

<sup>547</sup> See "A Guide on Immigration Documents Commonly Used by Benefit Applicants" (Sep. 2019); <https://save.uscis.gov/web/media/resourcesContents/SAVEGuideCommonlyusedImmigrationDocs.pdf> (accessed Aug. 10, 2021).

workers from accessing the legal immigration system and government services available to them.

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## RECOMMENDATIONS

The CIS Ombudsman recommended the following:

1. Mail the receipt notice and approval notice (with Form I-94) to the beneficiary. Because Form I-129 collects the beneficiary's residential address, USCIS could mail the receipt notice directly to the beneficiary. Beneficiaries can then use the USCIS online account tools, the USCIS Case Status Online page, and the USCIS Contact Center to track the status of the petition to receive updates, such as when a decision is made. To comply with the statutory requirement that beneficiaries be issued Form I-94, USCIS has similar options available. USCIS could mail a paper approval notice, containing Form I-94, directly to the beneficiary.<sup>548</sup>
2. Until Form I-129 becomes available for online filing and more extensive electronic processing/adjudication, USCIS could leverage current online features to overcome problems with inaccurate or obsolete beneficiary mailing addresses. USCIS could allow the beneficiary to track case status online and eventually provide receipt and approval notices (with Form I-94) directly to the beneficiary's online account.<sup>549</sup>
3. Another option to overcome problems associated with mailing addresses provided by employers on Form I-129 is for USCIS to develop and implement technological solutions that enable beneficiaries to obtain receipt/approval information online. Similar to the website U.S. Customs and Border Protection (CBP) has developed for nonimmigrant travelers to obtain their Form I-94 information, USCIS could allow beneficiaries to enter information from their passports to retrieve this information online.<sup>550</sup> Alternatively, USCIS could collaborate with CBP to provide Form I-94 electronically via CBP's website. CBP has previously indicated that it would explore the possibility of adding USCIS approval information to its website.<sup>551</sup> The CIS Ombudsman encourages USCIS to coordinate with CBP to advance this feature.<sup>552</sup>

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<sup>548</sup> The CIS Ombudsman only recommends that USCIS provide beneficiaries with copies of receipt and approval notices, not requests for evidence, denial notices, or any other correspondence that might disclose confidential petitioner/company information.

<sup>549</sup> USCIS Web page, "Benefits of a USCIS Online Account;" <https://www.uscis.gov/file-online/benefits-of-a-uscis-online-account> (accessed Oct. 22, 2021).

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<sup>550</sup> See CBP Web page, "I-94 Website;" <https://i94.cbp.dhs.gov/i94/#/home> (accessed Aug. 10, 2021).

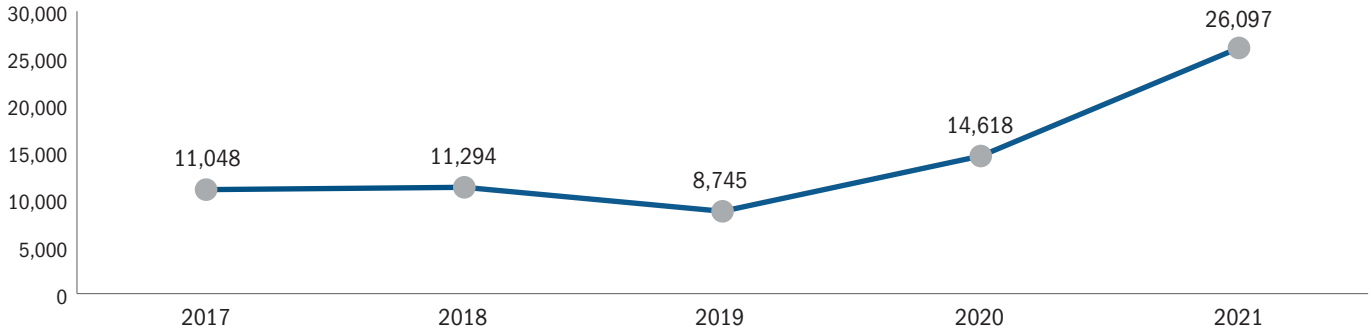
<sup>551</sup> "Definition of Form I-94 to Include Electronic Format," 81 Fed. Reg. 91646, 91650 (Dec. 19, 2016).

<sup>552</sup> "The new definition makes clear that the Form I-94 now includes information collected electronically and also defines 'original Form I-94' to include the printout from the I-94 website. Due to the new definition provided for the Form I-94, CBP believes it is clear that the printout constitutes evidence of registration and no further change is needed." "Definition of Form I-94 to Include Electronic Format," 81 Fed. Reg. at 91649.

# APPENDICES

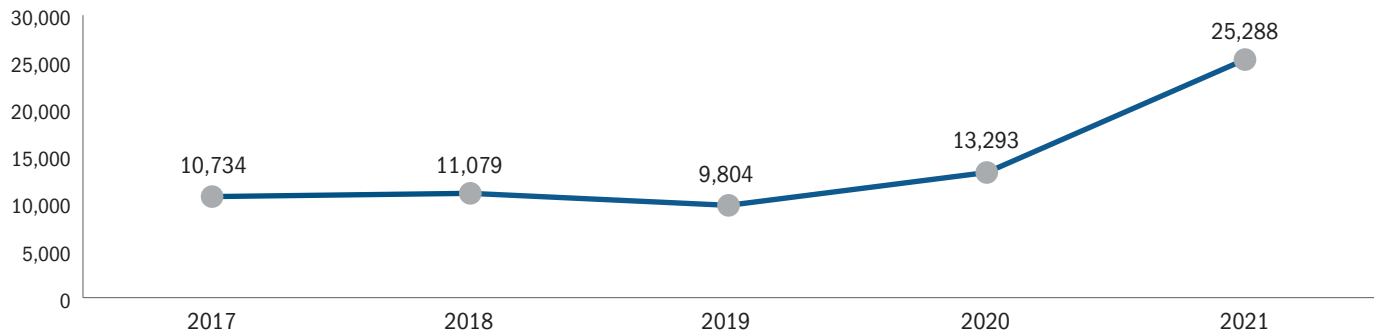
## CIS Ombudsman By The Numbers

CIS Ombudsman Requests for Case Assistance Received by Calendar Year

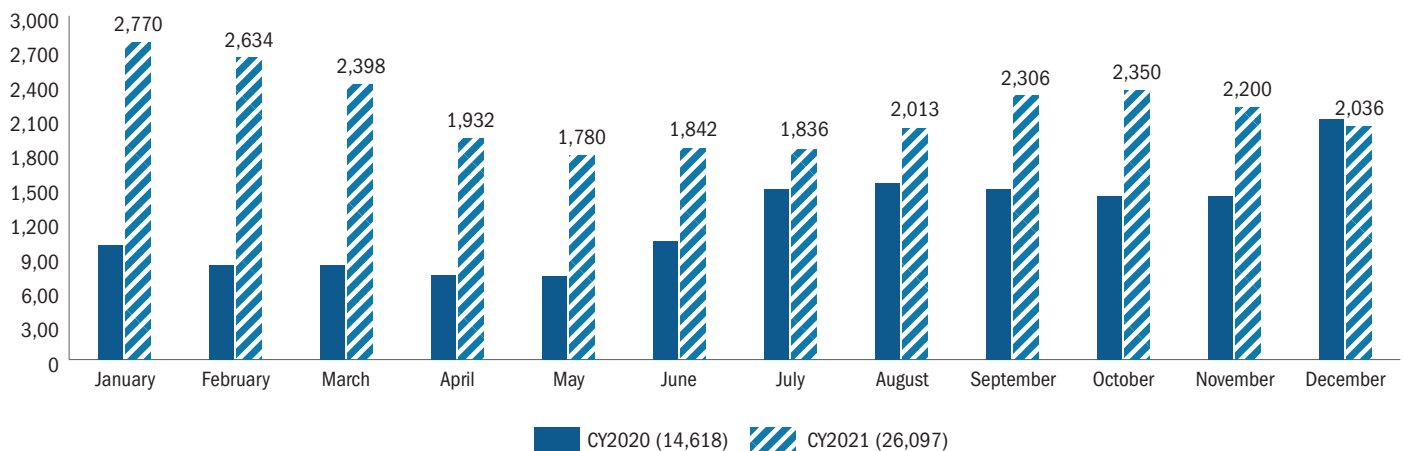


Source: Information provided through requests for case assistance.

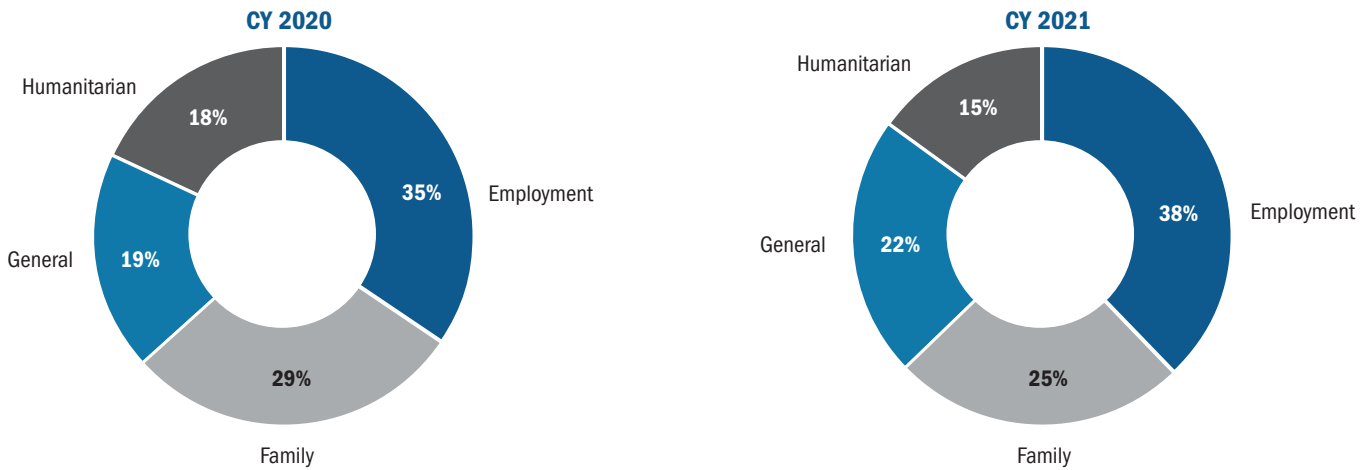
CIS Ombudsman Requests for Case Assistance Resolved by Calendar Year



CIS Ombudsman Requests for Case Assistance Received by Month for Calendar Years 2020 and 2021



### CIS Ombudsman Requests for Case Assistance—Submission by Category



### CIS Ombudsman Top Forms Requesting Case Assistance, 2021


Form	# Received	% of Total Requests
I-765, Application for Employment Authorization	6,500	25%
I-485, Application to Register Permanent Residence or Adjust Status	4,905	19%
I-130, Petition for Alien Relative	2,630	10%
I-539, Application to Extend/Change Nonimmigrant Status	2,429	9%
N-400, Application for Naturalization	1,504	6%
I-131, Application for Travel Document	780	3%
I-751, Petition to Remove Conditions on Residence	744	3%
I-140, Immigrant Petition for Alien Worker	684	3%
I-821D, Consideration of Deferred Action for Childhood Arrivals	603	2%
I-589, Application for Asylum and for Withholding of Removal	427	2%


### CIS Ombudsman Top Forms Requesting Case Assistance, 2020


Form	# Received	% of Total Requests
I-765, Application for Employment Authorization	3,303	23%
I-485, Application to Register Permanent Residence or Adjust Status	2,697	18%
I-130, Petition for Alien Relative	1,627	11%
I-539, Application to Extend/Change Nonimmigrant Status	1,350	9%
N-400, Application for Naturalization	814	6%
I-751, Petition to Remove Conditions on Residence	587	4%
I-129, Petition for a Nonimmigrant Worker	503	3%
I-589, Application for Asylum and for Withholding of Removal	333	2%
I-131, Application for Travel Document	296	2%
I-140, Immigrant Petition for Alien Worker	282	2%





**Top Ten States Where Applicants Reside and the Top Five Primary Form Types**


<b>CALIFORNIA</b>			
<b>Total Requests Received: 3,548</b>			
Top Primary Form Types	Count	% of Total	
I-765, Application for Employment Authorization	1,025	29%	
I-485, Application to Register Permanent Residence or Adjust Status	829	23%	
I-539, Application to Extend/Change Nonimmigrant Status	380	11%	
I-130, Petition for Alien Relative	250	7%	
N-400, Application for Naturalization	233	7%	


<b>TEXAS</b>			
<b>Total Requests Received: 2,697</b>			
Top Primary Form Types	Count	% of Total	
I-485, Application to Register Permanent Residence or Adjust Status	686	25%	
I-765, Application for Employment Authorization	671	25%	
I-539, Application to Extend/Change Nonimmigrant Status	245	9%	
I-130, Petition for Alien Relative	219	8%	
N-400, Application for Naturalization	216	8%	


<b>FLORIDA</b>			
<b>Total Requests Received: 1,901</b>			
Top Primary Form Types	Count	% of Total	
I-485, Application to Register Permanent Residence or Adjust Status	560	29%	
I-765, Application for Employment Authorization	531	28%	
I-130, Petition for Alien Relative	204	11%	
N-400, Application for Naturalization	155	8%	
I-539, Application to Extend/Change Nonimmigrant Status	85	4%	

<b>NEW YORK</b>			
<b>Total Requests Received: 1,685</b>			
Top Primary Form Types	Count	% of Total	
I-485, Application to Register Permanent Residence or Adjust Status	495	29%	
I-765, Application for Employment Authorization	395	23%	
I-130, Petition for Alien Relative	206	12%	
N-400, Application for Naturalization	143	8%	
I-751, Petition to Remove Conditions on Residence	83	5%	

<b>NEW JERSEY</b>			
<b>Total Requests Received: 1,016</b>			
Top Primary Form Types	Count	% of Total	
I-765, Application for Employment Authorization	319	31%	
I-485, Application to Register Permanent Residence or Adjust Status	266	26%	
I-539, Application to Extend/Change Nonimmigrant Status	166	16%	
I-130, Petition for Alien Relative	60	6%	
I-131, Application for Travel Document	41	4%	

<b>WASHINGTON</b>			
<b>Total Requests Received: 726</b>			
Top Primary Form Types	Count	% of Total	
I-765, Application for Employment Authorization	245	34%	
I-485, Application to Register Permanent Residence or Adjust Status	156	21%	
I-539, Application to Extend/Change Nonimmigrant Status	136	19%	
I-130, Petition for Alien Relative	48	7%	
I-131, Application for Travel Document	29	4%	

<b>VIRGINIA</b>			
<b>Total Requests Received: 708</b>			
Top Primary Form Types	Count	% of Total	
I-485, Application to Register Permanent Residence or Adjust Status	184	26%	
I-765, Application for Employment Authorization	168	24%	
I-130, Petition for Alien Relative	80	11%	
N-400, Application for Naturalization	77	11%	
I-539, Application to Extend/Change Nonimmigrant Status	69	10%	

<b>ILLINOIS</b>			
<b>Total Requests Received: 704</b>			
Top Primary Form Types	Count	% of Total	
I-485, Application to Register Permanent Residence or Adjust Status	183	26%	
I-765, Application for Employment Authorization	147	21%	
I-130, Petition for Alien Relative	78	11%	
I-539, Application to Extend/Change Nonimmigrant Status	73	10%	
N-400, Application for Naturalization	56	8%	

<b>MARYLAND</b>		
<b>Total Requests Received: 626</b>		
<b>Top Primary Form Types</b>	<b>Count</b>	<b>% of Total</b>
I-485, Application to Register Permanent Residence or Adjust Status	200	32%
I-765, Application for Employment Authorization	148	24%
N-400, Application for Naturalization	64	10%
I-130, Petition for Alien Relative	62	10%
I-539, Application to Extend/Change Nonimmigrant Status	33	5%



<b>GEORGIA</b>		
<b>Total Requests Received: 622</b>		
<b>Top Primary Form Types</b>	<b>Count</b>	<b>% of Total</b>
I-765, Application for Employment Authorization	168	27%
I-485, Application to Register Permanent Residence or Adjust Status	161	26%
I-130, Petition for Alien Relative	70	11%
I-539, Application to Extend/Change Nonimmigrant Status	60	10%
N-400, Application for Naturalization	38	6%



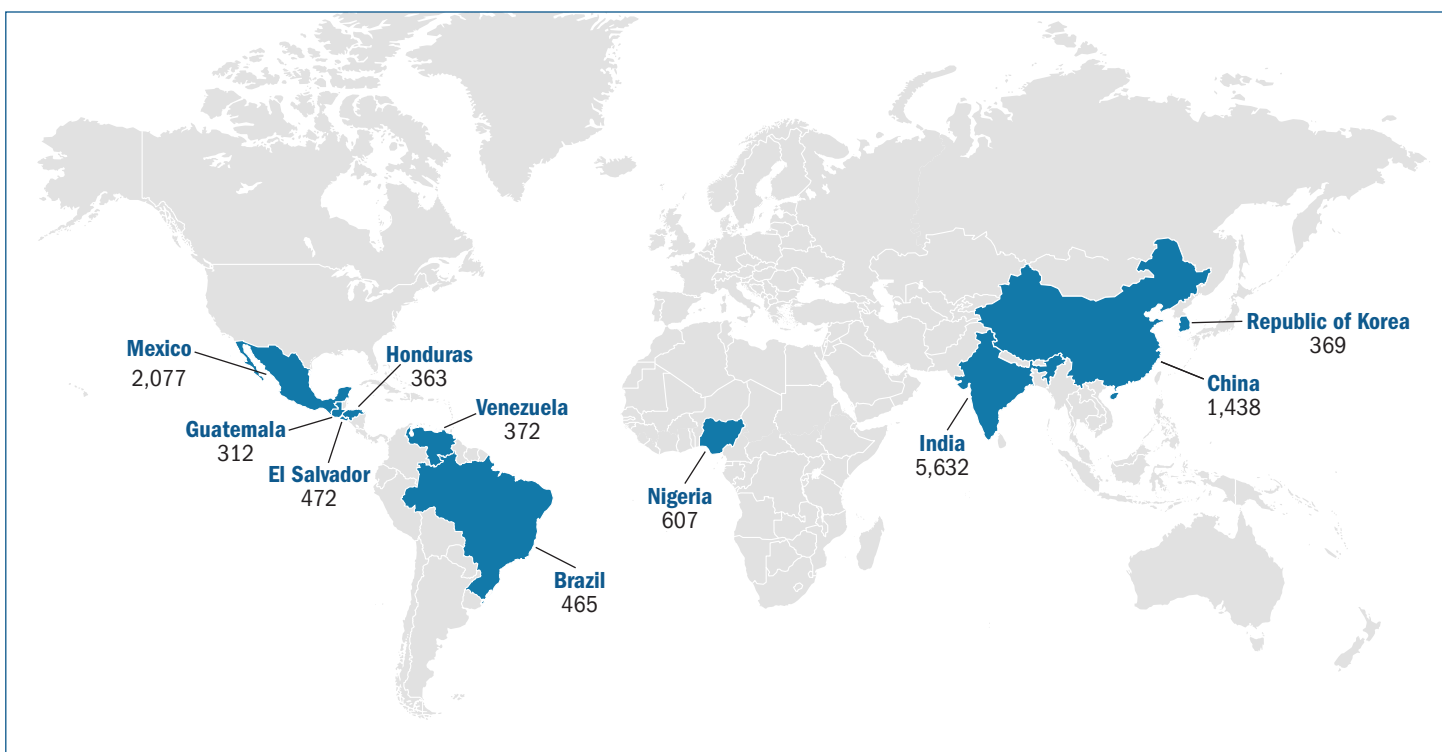
### Requests for Case Assistance: Top Office Locations

<b>USCIS Office</b>	<b>Count</b>
Texas Service Center	3,329
Nebraska Service Center	2,937
National Benefits Center	2,542
California Service Center	1,965
Vermont Service Center	1,914
Potomac Service Center	1,716
Lockbox	1,283
Dallas Field Office	280
Chicago Field Office	264
Houston Field Office	236
<b>Grand Total</b>	<b>16,466</b>

### Requests for Case Assistance: Top Requestor Locations

<b>City</b>	<b>Count</b>
Brooklyn	436
Miami	422
Houston	422
New York	387
Los Angeles	340
Chicago	289
Dallas	263
San Jose	241
Austin	237
San Diego	191
<b>Grand Total</b>	<b>3,228</b>

### Requests for Case Assistance: Top Requestor Countries of Birth



# Updates to the CIS Ombudsman's 2021 Recommendations

2021 Recommendation	USCIS Response	CIS Ombudsman Update
<i>USCIS In the Time of Covid-19: A Year Like No Other</i>		
<p>The agency cannot solely rely on fees. The experiences over the past year underscore the urgency of comprehensively reexamining the agency's funding and staffing models.</p>	<p>USCIS concurs and has taken active measures to address this issue: requesting an increase of \$345 million in the FY22 President's Budget Request to address the growing backlog and to meet the Administration's refugee admission target of 125,000. In the FY22 Continuing Resolution, USCIS received \$250 million of the \$345 million that was requested. USCIS also received \$193 million for Operation Allies Welcome.</p>	<p>The CIS Ombudsman notes USCIS' active measures to address its budget needs and will continue to support the agency in these efforts. We recently released a recommendation recommending USCIS to seek additional backlog funding as well as a fee mechanism, such as a loan mechanism, that USCIS may draw upon to address unexpected revenue shortfalls and unfunded policy shifts and to maintain adequate staffing.</p>
<p>Continue pandemic best practices into post-pandemic future.</p>	<p>USCIS plans to continue many of the best practices adopted during the pandemic, such as video-facilitated interviews to meet physical distancing requirements at field offices and to conduct RAIO interviews. Other practices include expanding digitization and electronic adjudication processes, increasing online filing opportunities and expanding the types of work processed electronically using telework.</p>	<p>The CIS Ombudsman encourages USCIS to keep building on those practices to augment its ability to best serve the needs of all its stakeholders.</p>
<p>Develop and implement a strategic backlog reduction plan.</p>	<p>USCIS directorates are committed to the timely processing of all benefit types, such as working towards backlog reductions through streamlined adjudications, biometrics reuse or suspensions when possible, strategic staffing increases, assessment based-interview scheduling, and shifting post-interview casework.</p>	<p>The CIS Ombudsman appreciates the agency's initiatives to reduce its backlog and also for establishing the recently announced new internal cycle times goals, premium processing expansions, and relief to work permit holders.</p>
<p>Resist the temptation to divert significant money from the agency's digital strategy.</p>	<p>USCIS uses the Capital Planning and Investment Control (CPIC) framework to track and report on the projected USCIS IT costs: personnel, operations and maintenance, and development. Its digital strategy is one the agency has prioritized in terms of allocating funding, and the agency will look to continue to fund this strategy through premium processing revenue.</p>	<p>The value of USCIS' digital strategy cannot be overstated. The CIS Ombudsman will continue to observe these technological improvements and appropriately make recommendations that can improve efficiencies.</p>
<p>USCIS should engage in a comprehensive education campaign on its e-tools.</p>	<p>The External Affairs Directorate created a dedicated public outreach team to educate internal and external stakeholders on the processes and benefits of USCIS online tools and services, including online filing.</p>	<p>USCIS has partnered with our office to host public engagements on online filing and customer service tools. The CIS Ombudsman values this partnership and will continue to serve as an ambassador for USCIS' online filing and digital tools.</p>
<p>A robust public engagement effort to anticipate and manage expectations, including the sharing of setbacks, as well as gains is critical.</p>	<p>USCIS continues to engage with stakeholders on processing times, adjudicative flexibilities, and other impacts from the COVID-19 pandemic via stakeholder messages, national engagements, posting of information to uscis.gov, and local outreach events.</p>	<p>As the CIS Ombudsman continues to partner with USCIS at identifying key priorities and finding new engagement opportunities, our office remains committed to deliver the agency's message to stakeholders.</p>

2021 Recommendation	USCIS Response	CIS Ombudsman Update
<b>Notice to Appear (NTA) Issuance: Problems Persist</b>		
USCIS should improve coordination and reconsider its role in the service of NTAs.	USCIS will continue leveraging contacts at EOIR and ICE to coordinate and better define our role in serving NTAs. Although the report suggested that USCIS pivoted to directly filing NTAs with EOIR due to the 2018 NTA policy, USCIS decided to directly file NTAs with EOIR to address a separate concern unrelated to the 2018 NTA Memo. If USCIS were to rely on ICE to file NTAs while continuing to prepare these documents and schedule hearing dates, it would result in noncitizens appearing for a hearing before the immigration judge and EOIR received the NTA.	The CIS Ombudsman appreciates the clarification and encourages the agency to strengthen its position in coordinating with EOIR and ICE. Our office will continue to champion collaboration and information sharing to any extent possible to improve issuance of NTAs.
Develop guidance for all directorates to define when in-person service is not practicable.	USCIS acknowledges the recommendation to serve NTAs in person. However, there are several reasons why this may not be feasible across all directorates. In-person service of an NTA is not practical as oftentimes NTAs are issued more than 45 days after denial. Additionally, due to the operational need to balance resources, NTA issuance may be significantly delayed beyond this as officers are required to interview and adjudicate pending benefit requests. Once a final decision is issued, noncitizens are unlikely to appear at a field office solely for NTA service.	The CIS Ombudsman understand the challenges of NTA in-person service but still encourages the agency to identify cases in which in-person service is possible.
Serve NTAs by certified mail.	Where in-person service is not practical, most NTAs issued by FOD are served by regular mail in accordance with 8 C.F.R. § 1003.13. USCIS will continue to assess the efficacy of using certified mail for NTAs, particularly in consideration of potential fiscal impact on increasing fees on benefit requestors.	The CIS Ombudsman continues to believe that certified mail could make service more effective and reduce the number of motions due to lack of notice with minimal fiscal impact.
Update the appropriate case management system to reflect that an NTA has been issued and, if applicable, when returned as undeliverable.	FOD and SCOPS officers are currently instructed to update case management systems to reflect when an NTA has been issued and, if applicable, when returned as undeliverable. USCIS will consider the feasibility of making system enhancements to display this information to noncitizens via online portals that enable them to view updates to their case status.	The CIS Ombudsman looks forward to those enhancements and in working with the agency to improve information sharing with noncitizens about their case status updates.
USCIS needs to recommit to creating a fair and just process.	USCIS will reaffirm its commitment to creating a fair and just process in alignment with the current administration's executive orders and enforcement priorities.	The CIS Ombudsman acknowledges USCIS' commitment and also commits to continue to support the agency in finding inequitable practices and recommend guidance that provide exceptions to relief where adequate.
USCIS needs to review additional ways to increase administrative efficiency.	USCIS will continue to review additional ways to increase administrative efficiency.	The CIS Ombudsman will continue to assess best practices to increase docket efficiency, reduce duplicative efforts and alleviate bottlenecks in the process.

2021 Recommendation	USCIS Response	CIS Ombudsman Update
<b><i>The Wedding Bell Blues: Processing of Removal of Conditions for Conditional Permanent Residents Based on Marriage</i></b>		
Lengthen the validity period for temporary evidence of Conditional Permanent Resident (CPR) status issued upon receipt of the Form I-751, to avoid the need for in-person field office visits to obtain continued conditional permanent resident status.	On September 4, 2021, USCIS revised the receipt notices for Form I-751, Petition to Remove Conditions on Residence, to increase the extension of the conditional permanent resident's Form I-551, Permanent Resident Card, from 18 months to 24 months.	The CIS Ombudsman commends USCIS on this action and encourages the agency to seek other opportunities where a receipt notice could provide additional extensions.
Revise interview waiver criteria to make interviews more efficient.	On April 7, 2022, USCIS revised its interview procedures to adopt a risk-based approach when waiving interviews for CPRs who have filed a petition to remove the conditions on their permanent resident status.	The CIS Ombudsman commends USCIS on this action and encourages the agency to seek additional opportunities to adopt a risk-based approach.
Post processing times for individual field offices, not as an aggregate, to better inform petitioners on their real wait times.	USCIS is aware of the processing delays associated with Form I-751 cases and is working toward solutions, including incorporating the Form I-751 into ELIS for more efficient processing. USCIS began initial testing in early February 2022.	The CIS Ombudsman recognizes that USCIS is committed to implementing new changes as efficiently as possible so applicants and petitioners receive decisions on their cases more quickly.
Initiate further improvements to concurrent Form I-751/N-400 processing to increase efficiencies.	USCIS began gathering business requirements to support technical development for electronic adjudication of Form I-751 in the spring of 2021. Initial testing began in early February 2022, with full deployment anticipated by the end of calendar year 2022.	The CIS Ombudsman looks forward to the outcomes of this test and awaits its full deployment.
<b><i>Accessing the Naturalization Starting Block: The Challenges of the Medical Disability Test Waiver Process</i></b>		
Better educate stakeholders on the availability of online filing of the Form N-400 with a disability waiver request to streamline submission and encourage online filers.	USCIS will continue to evaluate the need to conduct outreach and educate the public about filing Form N-400 online via myUSCIS with the Form N-648 uploaded as evidence at the time of filing.	The CIS Ombudsman will continue to partner with USCIS in engaging stakeholders and educating the public in the use of online tools.
Pre-adjudicate concurrently filed Forms N-648 at the National Benefits Center (NBC) to foster consistency and efficiency.	This has been tried before and not found effective as additional information is often needed prior to and from information provided by the applicant during the interview.	The CIS Ombudsman recognizes this effort and will redirect its efforts into other ways to improve the N-648 adjudication process.
Increase USCIS adjudicators' training to improve consistency of adjudication.	USCIS officers receive training on Form N-648 policy updates when changes are made to the Form N-648 and field offices offer refresher training periodically. USCIS also continues to review and update N-648 training materials.	The CIS Ombudsman understands policy updates are optimal opportunities to retrain officers and encourages USCIS to continue to refresh and enhance training periodically.
Expand the list of authorized medical professionals, such as by including nurse practitioners, to improve access to and raise the quality of information provided.	USCIS will review the list of medical professionals who are authorized to certify the Form N-648 and consider whether expanding the list codified at 8 CFR 312.2 is warranted.	The CIS Ombudsman looks forward to this review and will be available to communicate and engage the public with any USCIS updates on the topic.

2021 Recommendation	USCIS Response	CIS Ombudsman Update
<p>Increase targeted public engagements with authorized medical professionals and legal and community-based organizations that facilitate completion of Form N-648 to ensure effective assistance.</p>	<p>USCIS will continue to evaluate the need to do outreach and educate stakeholders about filing Form N-400 online and uploading the Form N-648 as evidence at the time of filing. USCIS also will explore additional guidance or training for medical professionals on how to properly complete Form N-648, consistent with any forthcoming policy and/or form changes and in consideration of USCIS resources and competing priorities.</p>	<p>The CIS Ombudsman acknowledges the efforts of USCIS' Naturalization Working Group to implement a national strategy building on community outreach and deepening partnerships to promote naturalization. Our office will continue to partner with the agency to promote naturalization through a robust public engagement strategy with federal, state, and local partners; community-based organizations; networks and businesses, such as last year's engagements to promote naturalization for military members, veterans and their families. The CIS Ombudsman looks forward to the outcomes from the medical professionals training exploration and working with the agency to improve information sharing with authorized medical professionals.</p>

**An Update on the Continuing Complications of USCIS Digital Strategy**

<p>Implement outreach and education to encourage customers to file online.</p>	<p>USCIS agrees that outreach and education are important portions of the rollout for online filing. The agency has crafted a robust outreach plan to encourage customers to file online. Activities include national engagements for each new form available for online filing, posting of presentations and Q&amp;As from these engagements to uscis.gov, providing outreach materials to community relations officers to use in local outreach events, and providing internal training on online filing to all external communicators. USCIS has developed a 5-year project schedule leading to a goal of complete electronic capability by FY26.</p>	<p>The CIS Ombudsman recognizes the full effort of USCIS to provide stakeholders the information and tools necessary to handle their immigration needs. Our office will continue to support the agency in promoting its goal of complete electronic capability by FY 26.</p>
<p>Establish relationships with third-party case management and forms vendors.</p>	<p>The Office of Information Technology (OIT) is looking at ways to expose Application Programming Interfaces (APIs) for USCIS systems to provide digital API products that are easily consumable by third party vendors. This methodology would offer self-service functionality similar to that used by other Federal agencies like the United States Postal Service.</p>	<p>As USCIS efforts continue in the development of the API platform, the CIS Ombudsman will continue to engage with industry and government partners to gather relevant feedback for this development.</p>
<p>Prioritize the development of high impact/volume immigration benefit filings.</p>	<p>USCIS has formed the Information Technology Steering Committee, a high-level group responsible for prioritizing IT development, including the development of forms for online filing. We are also focusing on building and enhancing the online account experience for applicants, petitioners, representatives and registrants.</p>	<p>The CIS Ombudsman believes that the online account experience has the potential to improve communication between the agency and stakeholders by keeping updated information, providing timely notices, allowing the upload of supporting documentation, and providing quicker responses to inquiries and case statuses.</p>
<p>Recommit to helping non-English proficient customers.</p>	<p>USCIS has a Language Access Working Group with members from across USCIS who review and analyze best practices and strategize on how to improve language service for our stakeholders.</p>	<p>USCIS is committed to serving stakeholders with limited English proficiency and those with disabilities through its website, online resources, and self-help tools; the CIS Ombudsman joins USCIS in this commitment and continues to implement best practices to assist those with limited English proficiency.</p>

2021 Recommendation	USCIS Response	CIS Ombudsman Update
<b>Interim Measures</b>		
<p>Increase use of electronic communications (email with attachments if possible) between officers and benefit filers, including their legal representatives.</p>	<p>A requirement of Section 4103 of the Emergency Stopgap USCIS Stabilization Act is: "(3) Issue correspondence, including decisions, requests for evidence, and notices of intent to deny, to immigration benefit requestors electronically." USCIS has recently finalized its strategy to fully implement the requirements.</p>	<p>The CIS Ombudsman agrees with USCIS' notion that the ability to communicate electronically with our customers is integral to achieving efficiencies in overall processing and encourages the agency to expand that ability to all aspects in the immigration process.</p>
<p>Establish a central portal for Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, that allows legal representatives to submit such notices electronically. USCIS can match these filings with the corresponding A-file.</p>	<p>Attorneys are currently able to create a representative account through the myUSCIS portal to file certain online forms for their clients. We will continue to maintain this online, account-based filing capability for attorneys and accredited representatives as we expand electronic adjudication and explore new methods for filing submissions.</p>	<p>While USCIS has made incredible progress to facilitate online communication, the myUSCIS portal still needs enhancements to facilitate the exchange of electronic documents. The CIS Ombudsman will continue to monitor feedback from stakeholders in the use of this portal and relay relevant information to the agency as it improves its online tools.</p>
<p>Expand access to filing fee payments by credit card to all forms submitted online or through USCIS' lockboxes. USCIS should use its agile development approach to adopt an enterprise-level payment system to allow those who directly file their applications with a USCIS field office or service center to pay by credit card.</p>	<p>All USCIS lockbox and field office filing locations are capable of accepting payments by credit card through the U.S. Treasury Department's Pay.gov service. In the late spring of 2021, USCIS launched a pilot at the Nebraska Service Center offering credit card payment using Form G-1450, Authorization for Credit Card Transactions, for U nonimmigrants filing Form I-485. In July, that pilot expanded to include Form I-907, Request for Premium Processing, for Form I-140, Immigrant Petition for Alien Workers.</p>	<p>The CIS Ombudsman acknowledges USCIS' expansion of credit card payments and further recommends that the agency engage stakeholders to clarify any doubts about the credit card usage program, its limits and concerns about transaction integrity.</p>
<b>Grading DHS's Support of International Student Programs</b>		
<p>Foster collaboration through an effective DHS working group involving headquarters and field participants.</p>	<p>Currently USCIS and ICE's Student and Exchange Visitor Program (SEVP) have a monthly meeting where we share information, collaborate on public messaging, share best practices, and discuss system integrations</p>	<p>The CIS Ombudsman applauds this collaboration and renders our office available to be part of the conversation to also exchange ideas and provide any relevant feedback.</p>
<p>Enhance training for DSOs to improve understanding of advanced issues and fraud.</p>	<p>Although USCIS is not officially tasked with training or monitoring DSOs, USCIS has assisted ICE in reviewing materials and participating in DSO sessions in the past. Should ICE SEVP ask for similar assistance, USCIS would provide assistance with training DSOs.</p>	<p>The CIS Ombudsman encourages USCIS to keep offering the assistance and training whenever possible.</p>
<p>Eliminate communication barriers between DSOs and USCIS.</p>	<p>The general process for DSO communication with DHS is that DSOs first communicate with ICE and then ICE communicates with USCIS. USCIS has regular, informal communications with ICE SEVP. In addition, USCIS has a dedicated mailbox for DSOs to inquire about I-765 employment authorization applications or submit certain requests on behalf of their students. As such inquiries are time-sensitive, the mailbox provides DSOs with an expeditious way to inquire about their students' I-765 applications.</p>	<p>The CIS Ombudsman encourages USCIS to explore other alternatives besides the use of a mailbox for expeditious inquiries from DSOs.</p>

# Homeland Security Act Section 452

## SEC.452. CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN.

- (a) **IN GENERAL**—Within the Department, there shall be a position of Citizenship and Immigration Services Ombudsman (in this section referred to as the ‘Ombudsman’). The Ombudsman shall report directly to the Deputy Secretary. The Ombudsman shall have a background in customer service as well as immigration law.
- (b) **FUNCTIONS**—It shall be the function of the Ombudsman—
- 1) To assist individuals and employers in resolving problems with the Bureau of Citizenship and Immigration Services;
  - 2) To identify areas in which individuals and employers have problems in dealing with the Bureau of Citizenship and Immigration Services; and
  - 3) To the extent possible, to propose changes in the administrative practices of the Bureau of Citizenship and Immigration Services to mitigate problems identified under paragraph (2).
- (c) **ANNUAL REPORTS**—
- 1) **OBJECTIVES**—Not later than June 30 of each calendar year, the Ombudsman shall report to the Committee on the Judiciary of the House of Representatives and the Senate on the objectives of the Office of the Ombudsman for the fiscal year beginning in such calendar year. Any such report shall contain full and substantive analysis, in addition to statistical information, and—
- (A) Shall identify the recommendation the Office of the Ombudsman has made on improving services and responsiveness of the Bureau of Citizenship and Immigration Services;
  - (B) Shall contain a summary of the most pervasive and serious problems encountered by individuals and employers, including a description of the nature of such problems;
  - (C) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which action has been taken and the result of such action;
  - (D) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which action remains to be completed and the period during which each item has remained on such inventory;
  - (E) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which no action has been taken, the period during which each item has remained on such inventory, the reasons for the inaction, and shall identify any official of the Bureau of Citizenship and Immigration Services who is responsible for such inaction;
  - (F) Shall contain recommendations for such administrative action as may be appropriate to resolve problems encountered by individuals and employers, including problems created by excessive backlogs in the adjudication and processing of immigration benefit petitions and applications; and
  - (G) Shall include such other information as the Ombudsman may deem advisable.
- 2) **REPORT TO BE SUBMITTED DIRECTLY**—Each report required under this subsection shall be provided directly to the committees described in paragraph (1) without any prior comment or amendment from the Secretary, Deputy Secretary, Director of the Bureau of Citizenship and Immigration Services, or any other officer or employee of the Department or the Office of Management and Budget.
- (d) **OTHER RESPONSIBILITIES**—The Ombudsman—
- 1) shall monitor the coverage and geographic allocation of local offices of the Ombudsman;
  - 2) shall develop guidance to be distributed to all officers and employees of the Bureau of Citizenship and Immigration Services outlining the criteria for referral of inquiries to local offices of the Ombudsman;
  - 3) shall ensure that the local telephone number for each local office of the Ombudsman is published and available to individuals and employers served by the office; and
  - 4) shall meet regularly with the Director of the Bureau of Citizenship and Immigration Services to identify serious service problems and to present recommendations for such administrative action as may be appropriate to resolve problems encountered by individuals and employers.



**(e) PERSONNEL ACTIONS—**

**1) IN GENERAL—**The Ombudsman shall have the responsibility and authority—

- (A) To appoint local ombudsmen and make available at least 1 such ombudsman for each State; and
  - (B) To evaluate and take personnel actions (including dismissal) with respect to any employee of any local office of the Ombudsman.
- 2) CONSULTATION—**The Ombudsman may consult with the appropriate supervisory personnel of the Bureau of Citizenship and Immigration Services in carrying out the Ombudsman’s responsibilities under this subsection.

**(f) RESPONSIBILITIES OF BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES—**The Director of the Bureau of Citizenship and Immigration Services shall establish procedures requiring a formal response to all recommendations submitted to such director by the Ombudsman within 3 months after submission to such director.

**(g) OPERATION OF LOCAL OFFICES—**

**1) IN GENERAL—**Each local ombudsman—

- (A) shall report to the Ombudsman or the delegate thereof;

- (B) may consult with the appropriate supervisory personnel of the Bureau of Citizenship and Immigration Services regarding the daily operation of the local office of such ombudsman;

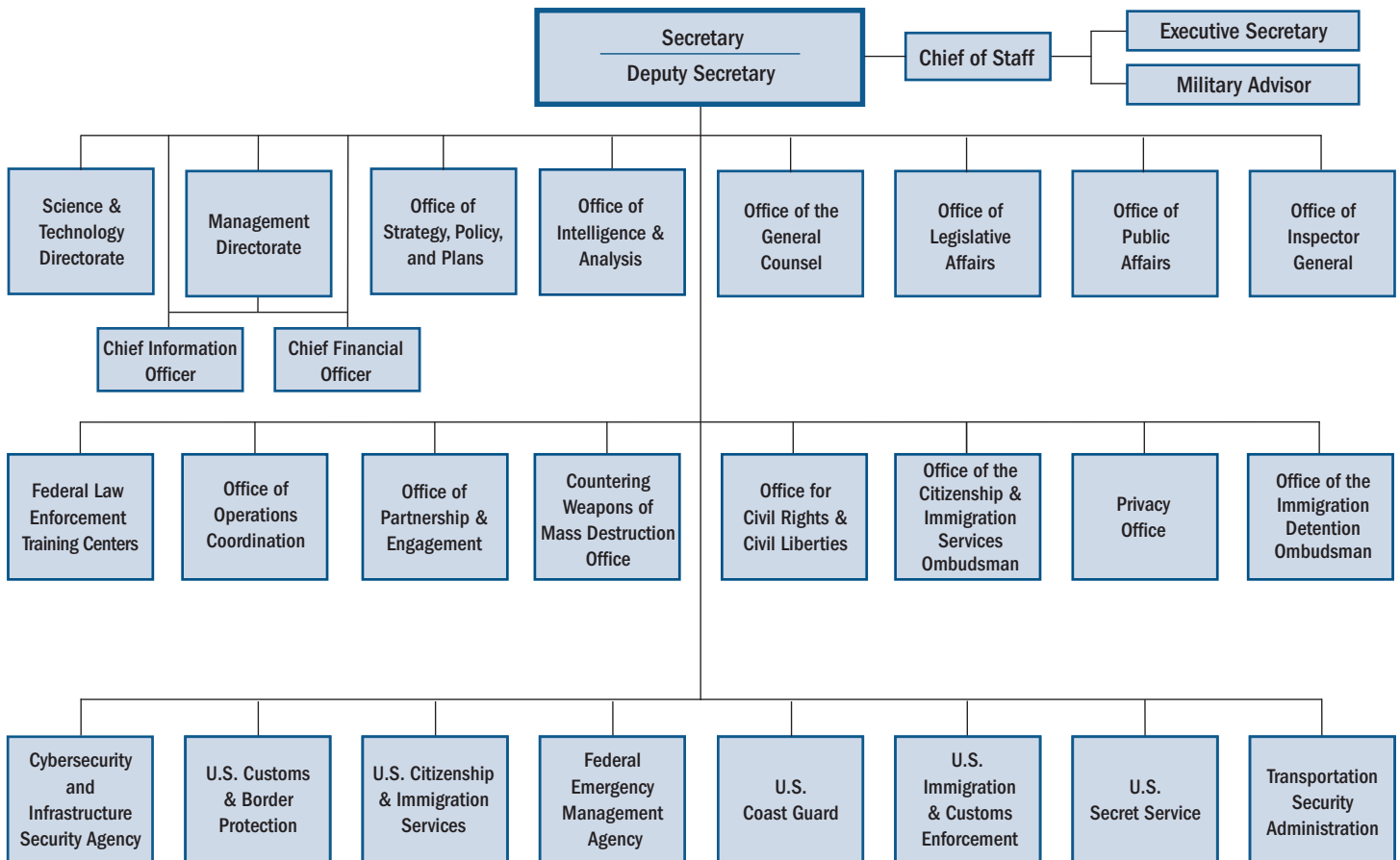
- (C) shall, at the initial meeting with any individual or employer seeking the assistance of such local office, notify such individual or employer that the local offices of the Ombudsman operate independently of any other component of the Department and report directly to Congress through the Ombudsman; and

- (D) at the local ombudsman’s discretion, may determine not to disclose to the Bureau of Citizenship and Immigration Services contact with, or information provided by, such individual or employer.

**(2) MAINTENANCE OF INDEPENDENT COMMUNICATIONS—**Each local office of the Ombudsman shall maintain a phone, facsimile, and other means of electronic communication access, and a post office address, that is separate from those maintained by the Bureau of Citizenship and Immigration Services, or any component of the Bureau of Citizenship and Immigration Services.



# Department of Homeland Security Organizational Chart



# USCIS Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year\*

Form	Form Description	Classification or Basis for Filing	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY** 2022
I-130	Petition for Alien Relative	Immediate Relative	6.5	7.6	8.6	8.3	10.2	9.6
I-131	Application for Travel Document	Advance Parole Document	3.0	3.6	4.5	4.6	7.7	7.2
I-140	Immigrant Petition for Alien Workers	Immigrant Petition (non-Premium filed)	7.3	8.9	5.8	4.9	8.2	10.9
I-360	Petition for Amerasian, Widow(er), or Special Immigrant	Immigrant Petition (All Classifications)	6.3	13.3	16.8	11.4	5.5	8.7
I-485	Application to Register Permanent Residence or to Adjust Status	Based on grant of asylum more than 1 year ago	5.5	6.2	6.7	6.9	12.9	22.9
I-485	Application to Register Permanent Residence or to Adjust Status	Employment-based adjustment applications	7.0	10.6	10.0	8.8	9.9	10.3
I-485	Application to Register Permanent Residence or to Adjust Status	Family-based adjustment applications	7.9	10.2	10.9	9.3	12.9	10.3
I-539	Application to Extend/Change Nonimmigrant Status	All Extend/Change Applications	2.8	3.4	4.4	4.8	9.6	7.3
I-751	Petition to Remove Conditions on Residence	Removal of conditions on lawful permanent resident status (spouses and children of U.S. citizens and lawful permanent residents)	11.8	15.9	14.9	13.8	13.6	17.4
I-765	Application for Employment Authorization	All other applications for employment authorization	2.6	3.0	3.4	3.2	3.9	4.2
I-765	Application for Employment Authorization	Based on an approved, concurrently filed, I-821D, Consideration of Deferred Action for Childhood Arrivals	1.8	1.2	1.1	1.1	1.9	0.5
I-765	Application for Employment Authorization	Based on a pending asylum application	1.7	0.9	2.0	2.5	3.2	8.3
I-765	Application for Employment Authorization	Based on a pending I-485 adjustment application	3.0	4.1	5.1	4.8	7.1	7.0
I-821D	Consideration of Deferred Action for Childhood Arrivals	Request for Renewal of Deferred Action	1.6	1.2	1.1	1.1	1.8	0.5
I-918***	Petition for U Nonimmigrant Status	Provide temporary immigration benefits to an alien who is a victim of qualifying criminal activity, and their qualifying family	31.5	41.8	48.7	54.3	53.6	59.8
N-400	Application for Naturalization	Application for Naturalization	7.9	9.7	10.0	9.1	11.5	11.0

Source: Historic Processing Times (uscis.gov) (accessed May 31, 2022).

\* USCIS' posted Historical Processing Times do not include processing times for several forms, including Form I-589, *Application for Asylum*.

\*\* As of April 30, 2022. Median processing times for FY 2022, used throughout this Report, differ depending on the date of access, as more data for FY 2022 is added to the calculation.

\*\*\* Includes Form I-918A, Petition for Qualifying Family Member of U-1 Recipient.

# How to Request Case Assistance from the CIS Ombudsman: Scope of Assistance Provided

Before asking the CIS Ombudsman for help with an application or petition, try to resolve the issue directly with USCIS by:

Submitting a request through your **myUSCIS account**.

Submitting a request through **Ask Emma**.

Contacting the USCIS Lockbox at **lockboxsupport@uscis.dhs.gov**.

Submitting an e-Request with USCIS online at **https://egov.uscis.gov/e-Request**.

Contacting USCIS for assistance at **1-800-375-5283**.

Contacting Refugee Affairs at **refugeeaffairsinquiries@uscis.dhs.gov**.

## STEP 1

### Submit a request for case assistance via:

- The online form available on our website, [www.dhs.gov/cisombudsman](http://www.dhs.gov/cisombudsman), or
- Email or mail by downloading the DHS Form 7001 at our website, [www.dhs.gov/cisombudsman](http://www.dhs.gov/cisombudsman)

Make sure to provide supporting documentation that would help our team review your request for case assistance. Legal representatives must include a signed Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*. Individuals requesting or who received T, U, and VAWA nonimmigrant status must also provide a copy of their signature on the DHS Form 7001 or Form G-28.

## STEP 2

### After receiving the DHS Form 7001, the CIS Ombudsman will:

- Provide confirmation of receipt with the CIS Ombudsman request number via email;
- Review the request for completeness and proper consent;
- Verify that USCIS has not received a duplicate inquiry for the same receipt number;
- Assess the current status of the application or petition and review relevant laws and USCIS policies to determine the issue that needs to be resolved;
- Notify the individual, employer, or attorney whether or not we are able to assist; and/or
- Contact the appropriate USCIS office to help resolve the difficulties the individual, employer, or attorney is encountering if we are able to assist.

**See [www.dhs.gov/case-assistance](http://www.dhs.gov/case-assistance) for more information.**



Homeland  
Security

**Citizenship and Immigration Services Ombudsman  
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